IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

No. 567

HOUSTON EAST & WEST TEXAS RAILWAY COMPANY, AND HOUSTON & SHREVEPORT RAILROAD COMPANY ET AL., *Appellants*,

vs.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION ET AL., *Appellees*.

Appeal from the United States Commerce Court.

BRIEF FOR APPELLANTS

BY

MAXWELL EVARTS,
JAMES C. WILSON,
HIRAM M. GARWOOD,
Attorneys for Appellants.

BAKER, BOTTS, PARKER & GARWOOD
Of Counsel.

GAST, BELLATS & YOUNG, HOUSTON, TEXAS

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This cause involves an appeal from a decree of the United States Commerce Court, of date April 25th, 1913, dismissing bill for injunction filed by appellants to restrain the enforcement of an order of the Interstate Commerce Commission.

On the 8th day of March, 1911, the Railroad Commission of Louisiana filed a petition with the Interstate Commerce Commission against the Houston East & West Texas Railway Company, the Houston & Shreveport Rail-

road Company, the St. Louis & Southwestern Railway Company, the St. Louis & Southwestern Railway Company of Texas, the Eastern Texas Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, the Texas & Pacific Railway Company, the Gulf, Colorado & Santa Fe Railway Company, and the International & Great Northern Railroad Company, complaining that these carriers discriminated in the rates carried on the various classes and commodities of traffic from Shreveport to Texas, in that the rates charged by the carriers from Texas distributing centers, such as Houston, Dallas and other points, in the direction of Shreveport, to points within the State of Texas, the trade of which was in competitive territory between such Texas distributing centers and Shreveport, were less for equal distances than the rates carried by such carriers on the same classes and commodities from Shreveport to such Texas competitive points, and that the Texas intrastate rates applied between such Texas points were less under substantially similar conditions than the interstate rates from the city of Shreveport, in the State of Louisiana, to such competitive points. The prayer of the complainants was that the Interstate Commerce Commission establish the same basis of rates of transportation between Shreveport and east Texas points as was accorded by the defendants to Texas competitors of Shreveport interests in the same line of business for the same distance. Complaint was also made that the interstate rates from Shreveport to such Texas points were unreasonably high. The Interstate Commerce Commission, after due and regular hearing, made its report and order upon this complaint on March 11th, 1912 (see 23 I. C. C., page 31),

(Tr., 19-60.) It was found therein that the class rates complained of out of Shreveport to the points on the Texas & Pacific mentioned in the order, and to points on the Houston East & West Texas Railway and the Houston & Shreveport Railroad, were unjust and unreasonable, and an order was made fixing reasonable rates on the several classes for the several stations on the Texas & Pacific Railway from Shreveport to Orphans Home, Texas, and from Shreveport, on the Houston East & West Texas Railway, to Houston, Texas. It was not found that the commodity rates complained of from Shreveport to the several Texas points were unreasonable, and the order of the Interstate Commerce Commission with regard to the commodity rates is based solely upon the proposition that the Texas intrastate rates applied by the carriers to and from Dallas, Houston and other distributing centers, to the points within the State of Texas, are less for substantially similar distances than the interstate rates from Shreveport to said points, and that thereby the intrastate Texas rates applied by the carriers are discriminative as against the interstate rates. The order of the Interstate Commission, which runs only against the Texas & Pacific Railway Company, the Houston East & West Texas Railway Co., and the Houston & Shreveport Railroad (Tr., 57-60) held that the class rates complained of were unreasonably high, and prescribed reasonable rates. As stated, the commodity rates complained of were not found to be unreasonable *per se*, but the Texas & Pacific Railway Company, the Houston East & West Texas Railway Company, and the Houston & Shreveport Railroad Company, were required, on or before the 1st day of May, 1912, and for a period of not

less than two years thereafter, to cease and desist from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Dallas, Texas, and points on the Texas & Pacific Railway intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas, Texas, towards Shreveport, for an equal distance. And from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Houston, Texas, and points on the line of the Houston East & West Texas Railway and the Houston & Shreveport Railroad intermediate thereto, than are contemporaneously exacted for the transportation of such articles from Houston, Texas, towards Shreveport, for an equal distance. The effective date of this order has been suspended from time to time as to the commodity rates complained of, and is still under suspension, but the order, in so far as it applied to the class rates, became effective May 1st, 1912, and is not here involved.

Separate suits to enjoin this order were filed by appellants, Houston East & West Texas Railway Company, Houston & Shreveport Railroad Company and Texas & Pacific Railway Company in the United States Commerce Court. The Missouri, Kansas & Texas Railway Company of Texas, St. Louis & Southwestern Railway Company, and St. Louis & Southwestern Railway Company of Texas, intervened, and were made parties to the suit filed by appellants Houston East & West Texas Railway and Houston & Shreveport Railroad Company, and are parties to this appeal.

While the bill for injunction against the order of the Interstate Commerce Commission (Tr., 1-65) attacked

the entire order of the Commission, both as to the class rates and the commodity rates, the attack upon the class rates was abandoned. The Interstate Commerce Commission having found as a conclusion of fact that these rates were unreasonable, the proceedings before the United States Commerce Court were confined to an attack upon the order of the Interstate Commerce Commission, in so far only as it applied to the commodity rates. The order complained of finds that while the interstate commodity rates from Shreveport to the competitive Texas territory between Shreveport and Dallas on the line of the Texas & Pacific Railway, and between Shreveport and Houston on the line of the Houston East & West Texas Railway and the Houston & Shreveport Railroad, are not unreasonable *per se;* that inasmuch as the intrastate Texas rates between points wholly within the State of Texas intervening between Dallas and Houston and Shreveport are less for substantially similar distances, these intrastate rates are illegally discriminative against Shreveport, and the order of the Commission is that they be equalized. The order was attacked in the bill before the United States Commerce Court upon three grounds:

First, that the order of the Commission seeks to regulate and control purely intrastate rates, and that under the Act to Regulate Commerce, it was without authority or jurisdiction to make such order;

Second, that the intrastate Texas rates complained of were rates installed by the Railroad Commission of Texas, and that the carriers, having no authority under the law to disregard such rates, or to install other or different rates, the same were not voluntary rates, and did not therefore constitute an illegal discrimination;

Third, that the Congress of the United States is with-

out power, under the Constitution of the United States, to regulate or control a purely intrastate rate.

These cases have been heard before the United States Commerce Court, and that court, on April 25th, 1913, sustained the order of the Commission and dismissed the bills. The main opinion was rendered in the case of Texas & Pacific Railway Company v. United States, is reported in 205 Fed. Rep., 380, and is attached hereto, marked Exhibit "A." An appeal having been duly prayed for, was allowed, and the cause is here presented for revision upon the following assignments of error:

FIRST.

The court erred in dismissing the petition of Houston East & West Texas Railway Company and Houston & Shreveport Railroad Company, petitioners herein, and the petitions of Missouri, Kansas & Texas Railway Company of Texas, St. Louis & Southwestern Railway Company and St. Louis & Southwestern Railway Company of Texas, intervening petitioners herein, and rendering final decree herein, sustaining and holding valid the order of the Interstate Commerce Commission in Cause No. 3918, J. J. Meredith, Shelby Taylor and Henry B. Schreiber, constituting the Railroad Commission of Louisiana, v. St. Louis Southwestern Railway Company et al., of date March 11, 1912, for that:

Said order of the Interstate Commerce Commission was, and is, wholly invalid and void, in that the Interstate Commerce Commission having therein held that the interstate commodity rates from Shreveport, Louisiana, to the several Texas points in said order mentioned, were in all things reasonable, the said Interstate Commerce Commission is without power, authority or jurisdiction to order petitioners, Houston East & West Texas Railway Company and Houston & Shreveport Railroad Company, to equalize rates imposed by the Railroad Commission of Texas between points wholly within the State of Texas, so as to conform said intrastate rates so made by and

under the authority of the Railroad Commission of Texas to the said interstate rates applicable from Shreveport, Louisiana, to said points in Texas mentioned, and said Interstate Commerce Commission is without power, authority or jurisdiction to compel petitioners to reduce reasonable interstate rates to equalize same with lower intrastate rates installed by petitioners under the compulsion of the orders of the Railroad Commission of Texas.

SECOND.

The court erred in dismissing said petition and sustaining said order of the Interstate Commerce Commission, for that:

The Interstate Commerce Commission is wholly without power or jurisdiction under the Interstate Commerce Act, approved February 4th, 1887, and act amendatory thereof, to make any valid order controlling or seeking to control rates wholly within the State of Texas made by the Railroad Commission of Texas, under and by virtue of valid laws of the State of Texas, duly authorizing it thereto.

THIRD.

The court erred in dismissing said petition and sustaining the said order of the Interstate Commerce Commission, for that:

The Congress of the United States is wholly without power to enact any valid law controlling, or seeking to control, purely intrastate rates applicable to commerce moving wholly between points situated within the limits of the State of Texas, and made by the Railroad Commission of Texas in pursuance of authority duly and legally conferred by the Constitution and laws of that State.

FOURTH.

The court erred in dismissing said petition and entering its final decree herein, sustaining the order of the Interstate Commerce Commission therein complained of, for that:

The uncontradicted evidence herein shows that the commodity rates complained of from Dallas towards Shreveport and from Houston towards Shreveport,

applied wholly to points within the State of Texas; that said rates were duly ordered and installed by the Railroad Commission of Texas, which had full power to make and install the same under the Constitution and laws of the State of Texas; and that petitioners and intervening petitioners, appellants herein, were forced, under the compulsion of severe penalties, to apply the same, and petitioners and intervening petitioners are, and were, wholly without right, power or authority, under said laws of the State of Texas, to apply between said points any other or different rates than the rates so prescribed by the Railroad Commission of Texas, and the Interstate Commerce Commission having held in the order complained of that the commodity rates herein involved from Shreveport, in the State of Louisiana, to said points in the State of Texas, were in and of themselves reasonable, petitioners, and intervening petitioners, appellants herein, were and are wholly without power or authority to make or apply between said points in the State of Texas any other or different rates than those prescribed by the Railroad Commission of Texas, and the Interstate Commerce Commission was and is wholly without power, authority or jurisdiction to compel petitioners and intervening petitioners, appellants herein, to install or apply between said points wholly within the State of Texas, any other or different rates than those prescribed by the Railroad Commission of Texas.

FIFTH.

The court erred in dismissing the petition of Houston East & West Texas Railway Company and Houston & Shreveport Railroad Company and the petitions of the intervening petitioners herein, and in sustaining the order of the Interstate Commerce Commission herein complained of, for that:

The Interstate Commerce Commission had no power or authority or jurisdiction to make any order on the petitioners or intervening petitioners herein, requiring or compelling them to remove the discrimination (if it be a discrimination,) it not being an undue or illegal discrimination, of which the Interstate Commerce Commission has, under Section 3 of the Act

to Regulate Commerce or any other valid law of the United States, power, authority or jurisdiction to remove.

These assignments present essentially the three propositions above referred to, to wit:

First, the Act to Regulate Commerce does not confer upon the Interstate Commerce Commission jurisdiction or authority to regulate or control purely intrastate rates, and the order complained of is void for lack of jurisdiction.

Second, the Texas intrastate rates complained of are not voluntary rates applied by the carriers, but are rates prescribed by the duly constituted authorities of the State of Texas, obedience to which is compelled by the Texas law, and such obedience cannot constitute an illegal discrimination under the Act to Regulate Commerce.

Third, the Congress of the United States has no power under the Constitution of the United States to regulate or control purely intrastate commerce and rates.

On December 19th, 1890, Section 2 of Article 10 of the Constitution of the State of Texas was amended so as thereafter to read as follows:

> "Railroads heretofore constructed, or which may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Pursuant to the constitutional authority here given, the legislature of the State of Texas passed an act creating the Railroad Commission of Texas, approved April 21st, 1891, which act is brought forward in the Revised Statutes of 1911, Articles 6653-6716, inclusive.

The powers and duties of said Railroad Commission are set forth in Articles 6654-6663, inclusive. Said articles being here set forth:

> "Art. 6654 *Powers and Duties.*—The power and authority is hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.
>
> "1. *To Classify Freights.*—The said Commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes and subdivisions as may be found necessary and expedient.
>
> "2. *To Fix Reasonable Rates.*—The Commission shall have power and it shall be its duty to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this chapter for the transportation of each of said classes and subdivisions.
>
> "3. *Classifications to be Uniform.*—The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this chapter.
>
> "4. *May Fix Different Rates.*—The said Commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines, if found necessary to do justice, and may make rates for express

companies, different from the rates fixed for railroads.

"5. *Rates for Connecting Lines.*—The said Commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this State reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more lines of such railroads.

"6. *Commission to Fix When There is Disagreement.*—If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the Commission shall fix the pro rata part of such charges to be received by each of said connecting lines.

"7. *Old Rates to Exist until Changed by the Commission.*—Until the Commission shall make the classification and schedules of rates as herein provided for, afterwards, if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classification and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

"8. *May Alter, Abolish, etc.*—The Commission shall have power, and it shall be its duty, from time to time, to alter, change, amend or abolish any classification or rate established by it when deemed necessary; and such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals.

"9. *May Adopt Rules and Regulations.* — The Commission may adopt and enforce such rules, regulations and modes of procedure as it may deem proper to hear, and determine complaints that may be made against the classifications and rates, the rules, regulations and determinations of the Commission.

"10. *Empty Cars.*—The Commission shall make reasonable and just rates or charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for

each railroad or for all railroads alike, reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours notice to the consignee, not to include Sundays.

"11. *May Fix Rates for all Services.*—The Commission shall make and establish reasonable rates for transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any other railroad subject hereto.

"12. *Railways to Maintain Depots, etc.*—It shall be the duty of each and every railway subject to this chapter to provide and maintain adequate, comfortable and clean depots and depot buildings at its several stations, for the accommodation of passengers; and said depot buildings shall be kept well lighted and warm for the comfort and accommodation of the traveling public, and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by said roads; provided that this shall not be construed as repealing any existing laws on the subject.

"Art. 6655. *Notice to be Given when Rates Fixed.*—Before any rate shall be established under this chapter, the Commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rate shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done, and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases:

"1. *May Fix Rules for All Investigations*—The Commission shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges and other acts required of it under this law; provided, no person de-

siring to be present at any such investigation by said Commission shall be denied admission.

"2. *May Administer Oaths, Etc.*—The chairman, and each of the Commissioners, for the purposes mentioned in this chapter, shall have power to administer all oaths, certify to all official acts, and to compel attendance of witnesses, and the production of papers, way-bills, books, accounts, documents and testimony, and to punish for contempt as fully as is provided by law for the District or County Court.

"Art. 6656. *Rates to be Held Conclusive until, Etc.*—In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said Commission before the institution of such action, shall be held conclusive and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein, until finally found otherwise in a direct action brought for that purpose in the manner prescribed by Arts. 6657-6658 of this chapter.

"Art. 6657. *When Railway Dissatisfied, May File Petition, Etc.*—If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court at either of its terms; and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that, if the court be in session at the time such right of action accrues, suit may be filed

during such term, and stand ready for trial after ten days' notice.

"Art. 6658. *Burden of Proof*—In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence, that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable or unjust to it or them.

"Art. 6659. *Railroads to be Furnished with Schedule of Rates Fixed*—Said Commission shall, as soon as the classifications and schedules of rates herein provided for are prepared by them, furnish each railroad subject to the provisions of this chapter with a complete schedule, in suitable form, showing the classification of freight made by them, and the rates fixed by said Commission to be charged by such road for the transportation of each class of freight, and shall cause a certified copy of such classification and schedule of rates to be delivered to each of said railroads at its principal office in this State, if it has such office in this State, and, if not, then to any agent of said company in this State; which said schedule, rules and regulations, shall take effect at the date which may be fixed by said Commission, not less than twenty days. Each of said railroad companies shall cause said schedule to be printed in type of a size not less than pica, and shall have the same posted up in a conspicuous place at each of its depots, so as to be inspected by the public. Said Commission may at any time abolish, alter, or in any manner amend the said schedule, or abolish or amend any such regulation; and in that event, certified copies of the schedules, rules or regulations, showing the changes therein, shall be delivered to each road as herein specified. In all cases where the rates shall not have been fixed by the Commission, no changes shall be made except after ten days' notice to, and consent of, the Commission.

"Art. 6660. *Emergency Freight Rates*—In addition to the powers conferred on the Railroad Commission of Texas by Arts. 6655 and 6659, said Commission shall have the power, when deemed by it necessary, to prevent interstate rate wars, and injury to the

business and interests of the people or railroads of the State, or in case of any other emergency to be judged of roads of the State, or in case of any other emergency to be judged of by the Commission, it shall be its duty to temporarily alter, amend, or suspend and existing freight rates, tariffs, schedules, orders and circulars on any railroad or part of railroad in this State, and to fix freight rates where none exist.

"Art. 6661. *To What Roads Apply*—Said emergency rates so made by the Commission shall apply on any one or more of all the railroads in this State, or part of railroads that may be directed by the Commission.

"Art. 6662. *Rates Take Effect, When and How Long Continued*—Said rates so made shall take effect at such time and remain in force for such length of time as may be prescribed by the Commission.

"Art. 6663. *Temporary Freight and Passenger Tariff, Power to Make*—In addition to all other powers conferred by law upon the Railroad Commission of Texas, said Commission shall have the power to make temporary freight and passenger tariffs to take immediate effect at such time as shall be fixed by said Commission whenever an emergency arises, the sufficiency of which shall be judged of by said Commission, in order that justice may be done or injury prevented any person, place or locality; and said Commission shall have the power at once to suspend temporarily any existing freight or passenger tariff, and to establish freight and passenger tariffs, rules and regulations for temporary use, to have immediate effect where none exist."

Under Art. 6669 of the Revised Statutes of Texas, it is made penal for any carrier to charge a greater rate of transportation than that prescribed by the Railroad Commission. The article is as follows:

"Art. 6669. *Penalty for Extortion*—If any railroad company subject to this chapter, or its agents, or officer, shall hereafter charge, collect, demand, or receive from any persons, company, firm or cor-

poration a greater rate, charge or compensation than that fixed and established by the Railroad Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than one hundred dollars, nor more than five thousand dollars."

Under Article 6671 of said statutes, a penalty accrues to each individual shipper when the carrier makes a charge in excess of that prescribed by the Railroad Commission. The article is as follows:

"Art. 6671. *Damages; Penalty; Venue in Cases of Discrimination*—In case any railroad subject to this chapter shall do, cause to be done, or permit to be done, any matter, act or thing, in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad shall be liable to the person or persons, firm or corporation, injured thereby for the damages sustained in consequence of such violation; and in case said railroad company shall be guilty of extortion or discrimination as by this chapter defined, then, in addition to such damages, such railroad shall pay to the person, firm, or corporation injured thereby a penalty of not less than one hundred and twenty-five dollars, nor more than five hundred dollars, to be recovered in any court of competent jurisdiction in any county into or through which such railroad may run; provided that such road may plead and prove as a defense to the action for said penalty that such overcharge was unintentionally and innocently made through a mistake of fact, provided that any such recovery as herein provided shall in no manner affect a recovery by the State of a penalty provided for such violation."

Failure to obey the orders of the Railroad Commission is made penal by Article 6672, which is as follows:

> "Art. 6672. *Penalty not Otherwise Provided*—If any railroad company doing business in this State shall hereafter violate any other provision of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not been provided by law, or shall fail, neglect, or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, for such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollars."

ARGUMENT.

I.

The act to regulate commerce does not confer upon the Interstate Commerce Commission jurisdiction or authority to regulate or control purely intrastate rates, and the order complained of is void for lack or jurisdiction.

The United States Commerce Court, through Knapp, P. J., thus states the case:

> "There is no dispute about the material facts, and they are easily comprehended. The interstate rates of petitioner from Shreveport, Louisiana, to Dallas, Texas, and intermediate points on its line, are very much higher in proportion to distance than the State rates of petitioner from Dallas to the same intermediate points in the state of Texas. For example, the rate on farm wagons from Shreveport to Marshall, a distance of 42 miles, is 56 cents per 100 pounds, while the rate from Dallas to Marshal, a distance of 147 miles, is only 36.8 cents. Under such an adjustment of freight charges, it is obvious that Shreveport is severely, if not fatally, handicapped in its competition with Dallas, for the trade of the intervening ter-

ritory, most of which is situated in the State of Texas. It appears that operating conditions are substantially the same throughout the entire line, and in both directions between these two cities, and petitioner makes no claim that the disparity in rates can be justified by differences in the cost of transportation. Indeed, it seems to be conceded that the rate situation here in question would clearly constitute undue prejudice to Shreveport, and undue preference to Dallas, within the meaning of the third section of the act [Act Feb. 4, 1887, c. 104, 24 Stat., 380 (U. S. Comp. St. 1901, p. 3155)], provided that section be applicable if the intrastate rates from Dallas, like the interstate rates from Shreveport, were voluntarily established by the carrier. But while the discrimination in fact against Shreveport is admitted, the contention is made that as a matter of law it is not, and cannot be, undue, or otherwise in violation of the act, because the intrastate rates in question are made by authority of the State of Texas, and the petitioner is under legal compulsion to observe them. In other words, it is insisted that a violation of the third section cannot be predicated upon a rate relation, however unjust, which is brought about not by the voluntary action of the carrier, but by the command of the State, which the carrier is constrained to obey.

"In this suit the order of the Commission is sought to be set aside only so far as it affects commodity rates, and the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the service rendered; that is, rates which conform to the requirements of the first section of the act, and which, therefore, petitioner may justly and lawfully charge. From this finding, in connection with other facts stated, it seems necessarily to follow that the intrastate commodity rates of petitioner from Dallas to the same destinations, which the Texas Commission has prescribed, are materially less than petitioner is justly entitled to charge; and this involves the further consequence that the Texas Commission, by imposing upon petitioner lower rates than it should rightfully receive, has, in point of fact, placed an undue burden upon interstate commerce,

and thereby obstructed the freedom of its movement. If this is a correct analysis of the situation, as is virtually admitted, it can hardly be doubted that the action which produces such a result, whether intended or otherwise, is in derogation of the power and authority of Congress under the Commerce Clause of the Constitution."

This clearly sets forth the attitude of the court and the majority of the Commission.

It is submitted that Simpson v. Shepherd, 33 Sup. Ct. Rep., 729, and Knott v. C. B. & Q. 33 Sup. Ct. Rep., 975, are decisive of this question, and render unnecessary the further citation of authorities.

In the Minnesota case the facts are directly applicable. There, there were numerous cities situated directly on or adjacent to the State line. Interstate rates had long been established from the points across the State line into Minnesota. The Minnesota rate being lower than this interstate rate, it was claimed by the carrier, and found as a fact by the trial court, that these State rates constituted a direct discrimination against the outside point, and compelled a reduction of the interstate rate, or else excluded the competitive point over the State line from competition.

In the case at bar the Interstate Commission does not find that the commodity rates here involved, from Shreveport to the competitive Texas territory, are unreasonable. To the contrary, it treats them as reasonable rates. The Commerce Court says:

"In this suit the order of the Commission is sought to be set aside only so far as it affects commodity rates, and the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the service rendered; that is, a rate which con-

forms to the first section of the act, and which, therefore, petitioner may justly and legally charge."

There is no finding that the Texas rates from Dallas and Houston towards Shreveport are *per se* unreasonably low. The order of the Commission, and its finding of an unlawful discrimination is based solely upon the proposition that, being lower than the interstate rates from Shreveport, the Texas jobber in Houston and Galveston, has, by reason of these lower and purely intrastate rates, an advantage in competitive territory. The order is that the rates be equalized, and the Commerce Court holds that the carrier is at liberty to increase the rate prescribed by the Railroad Commission of Texas, notwithstanding the Texas statutes punish such action by the severest penalties, accruing both to the State and to the individual shipper, upon each shipment. The court says:

"The Commission also found by necessary inference, as its order clearly indicates, that the interstate commodity rates in question were not unreasonable, thus, in effect sanctioning the continuance of those rates. It is likewise a necessary inference from the report and order that, the unlawful discrimination against Shreveport, so far as commodity rates are concerned, was caused by the imposition of intrastate rates, which are lower than petitioner is justly entitled to charge. This being so, it follows that petitioner is at liberty, and has the right, to comply with the Commission's order by making a proper increase of its Texas rates. Indeed, since its interstate rates are not excessive, such an increase appears to be the only method of compliance which would be just, both to the shipper and the carrier. When this order was made upon the facts so ascertained and reported, it had the effect, in our judgment, of relieving petitioner from further obligation to observe the intrastate rates which the Texas authorities had prescribed. The petitioner was no

longer under compulsion in respect to those rates, because the rate situation disclosed by the inquiry was subject in its entirety to the provisions of the Federal statute and the administrative control of the Commission. The order of the Commission therefore operated to release petitioner as regards the intrastate rates in question from the restraint imposed by the State of Texas, and thereupon, petitioner became entitled, if it did not choose to reduce its interstate rates, to comply with the order by advancing its Texas rates sufficient to remove the forbidden discrimination. Its obedience was due to the superior authority, and it ceased to be bound by any inconsistent obligation."

While much is said in the majority opinion of the Interstate Commerce Commission as to the "protective policy" of the Railroad Commission of Texas, it sufficiently appears that the Texas rates complained of are the ordinary mileage rates which apply between all points in Texas. These rates are presumably reasonable, and by statute they are made conclusively so in all litigation between private parties until set aside by direct action brought for that purpose.

It is probable that both the Commerce Court and the majority of the Commerce Commission were unduly influenced by the decision of Judge Sanborn in the Minnesota case, 184 Fed. Rep., 765.

Section 1 of the act to regulate commerce limits the jurisdiction of the Interstate Commerce Commission, both affirmatively and negatively. After first stating that the provisions of the act apply to transportation from one State or Territory or the District of Columbia, to another State or Territory of the United States, or the District of Columbia, etc., it would seem to have been sufficiently specific to exclude from the jurisdiction of the Commis-

sion purely intrastate commerce. In order that there could be no possible question as to such jurisdiction, the following proviso was added:

> "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering storage or handling of property wholly within one State, and not shipped to, or from, a foreign country, from or to any State or Territory as aforesaid."

The limitations of the first section are further made more specific by making the act applicable to transportation of property shipped from *any place in the United States* to a foreign country, and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry, either in the United States or an adjacent foreign country. The contention made by the majority of the Commission that section 3 of the act broadened its powers, is also disposed of by the decisions of this court in the cases referred to, and it is clearly made apparent by the dissenting opinions of Commissioners Clements, Harlan and McCord that all of the powers conferred in the act must be exercised under the limitations prescribed by section 1.

In order to reach the results obtained in this finding, the Interstate Commission was under the necessity of overruling its own opinions in the following cases: In the Matter of Freight Rates between Memphis and Points in Arkansas, 11 I. C. C., 180; Saunders v. Southern Express Company, 18 I. C. C., 415; Andy's Ridge Coal Company v. Southern R'y Co., 18 I. C. C., 405; New Jersey Fruit Exchange v. C. R. R. of N. J., 2 I. C. R., 84.

In the first of these cases this exact issue was sharply

raised. Complaint was made that local Arkansas rates to Little Rock and Pine Bluff operated as a discrimination against Memphis, and without dissent, the Commission, speaking through Chairman Knapp, said:

> "So far as the discrimination of which Memphis complains was caused by the action of the Arkansas Commission, without the consent and against the protest of defendant, it is certainly doubtful in the present state of law whether the defendant can be held responsible. If its voluntary adjustment of rates between these cities was fair and equitable, and that adjustment has been changed and rendered unfair to one of them by action which the defendant could not prevent or control, it is difficult to see on what theory it can be held at fault for the resulting discrimination, provided its Memphis rates *per se* are just and reasonable. In a word, we are constrained to reject the complainant's contention so far as the charge of discrimination against Memphis rests wholly upon comparison with the lower rates imposed by the Arkansas Commission."

In the case of Saunders v. Southern Express Company, 18 I. C. C., 415, the rates imposed by the Railroad Commission of Alabama severely discriminate against the interstate rates from Pensacola to competitive points. The Commission held, speaking through Commissioner Harlan, that it had no jurisdiction in the premises. It was said:

> "Moreover, as the defendant's rates are held down under the compulsion of the order by the State Commission, an order by this Commission requiring it to cease and desist from a resulting discrimination against Pensacola would be equivalent to an order requiring defendant to reduce its Pensacola rate to a level with the State rates out of Mobile. Such an order we are not prepared to enter, at least at this time, and as now advised. This view of the record will leave the Pensacola fish dealers without present redress before this Commission so far as the dis-

crimination complained of is concerned, but the situation is one that we find it difficult to remedy under existing legislation. While we have full authority upon certain principles and within certain limits distinctly fixed in the amended act to deal with interstate rates, it is expressly provided in section 1 that 'the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country, from or to any State or Territory as aforesaid.' This language seems to have but one meaning, and that is that, although the Commission may give, and has in fact given, to the National Commission authority to control and regulate the rates to be demanded and accepted by the interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely State traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order, the purpose of which is to directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama Commission."

In the case of Andy's Ridge Coal Company v. Southern Railway Company et al., 18 I. C. C., 405, one of the rates complained of was wholly an intrastate rate. This intrastate rate, the Commission, speaking through Commissioner Prouty, was held to be discriminative against the interstate rate, but without dissent it was again held that the Commission had no power to correct the discrimination. It was said:

"While, however, it has seemed proper to note the discrimination which we find to exist, the Commission is of the opinion that it has no jurisdiction to require by its order a discontinuance of that discrimination, inasmuch as the rate used by the complainant is a

State rate, the movement from from Coal Creek to Nashville being entirely within the State of Tennessee."

Mr. Prouty, in the present opinion, states that this case should be overruled, and it is, of course, very effectually overruled by the majority opinion. Nevertheless, Mr. Prouty himself, in the case of Southwestern Shippers Traffic Association v. A. T. & S. F. R'y Co. et al., 24 I. C. C., 570, decided June 6th, 1912, clearly held that the Commission, without further power conferred by Congress, could not remedy a discriminative situation growing out of State rates from Galveston to interior Texas points. Certain Oklahoma shippers complained of these Texas rates as discriminative against Oklahoma points. But it was held that the Commission was powerless to remedy the situation. He said:

"The hardship which the present adjustment of rates imposed upon central Oklahoma points has been strongly urged upon the attention of the Commission in this proceeding. The Texas Commission establishes rates upon a mileage basis up to a certain distance, beyond which the rate applies as a blanket to all Texas common points. Thus, the first class rate from Galveston for a distance of approximately 300 miles is 87 cents, and this same rate applies to the northern border of Texas, a distance of 450 miles. This gives the distributing cities in the north of Texas, which wholesale in competition with Oklahoma points, a distinctly lower rate from the Atlantic seaboard than Oklahoma enjoys, and undoubtedly results in a decided advantage to Texas jobbing centers in case of articles purchased upon the Atlantic seaboard, but this discrimination is one which this Commission is powerless to remedy. The Texas rates are a matter of domestic concern, over which we exercise no control. The so-called discrimination results not from the Texas rates, but from the fact that under the decision of the Supreme Court of the

United States, the jobber, by taking possession of his traffic at Galveston, can obtain the benefit of the water rate to Galveston, and the rail rate from Galveston, although the shipment is in point of fact an interstate movement. If the results which flow from this holding are not satisfactory, Congress may easily provide that a movement which is interstate in fact shall not be converted into two local movements by an intervening possession. In that case this Commission could establish a reasonable rate to Texas points which must be applied to all shipments from the Atlantic seaboard to those points, and a discrimination resulting from arbitrary conditions like that before us would be rendered impossible. Today this Commission, while it recognizes the existence of the discrimination, cannot pronounce it unlawful."

It will be noted that this case is a much stronger one in favor of the jurisdiction of the Interstate Commission than the case at bar. In fact, Mr. Prouty holds that the movement under the Texas rates from Galveston is really interstate commerce, the transit of which is broken at Galveston. Nevertheless, he holds that by taking possession of his goods at Galveston, the transit is broken, and the rate from Galveston to the border line of Texas, while it results in a discrimination against those shippers across the border, is nevertheless wholly beyond the jurisdiction of the Commission until enlarged by congressional action.

A similar question was before the Commission in the case of P. P. Williams Co. v. Vicksburg, Shreveport & Pacific R'y Co. et al., 16 I. C. C., 482.

The Vicksburg, Shreveport & Pacific Railway runs due west from Vicksburg, through Louisiana, to Shreveport, where connection is made on a practically continuous line with the T. & P. Railway and other roads, to northern Texas points. Vicksburg is as near to, and in some cases

much nearer, competitive points in northern Texas than Galveston. Nevertheless, the interstate rates from Vicksburg to these points were largely in excess of the Texas intrastate rates from Galveston to the same points, the articles especially involved being bagging and ties and wire and nails. For instance, from Galveston to Dallas is 321 miles, and from Vicksburg to the same point is 359 miles. Yet the interstate rate on bagging and ties from Vicksburg is 32 cents per hundred pounds, while from Galveston the state rate is 21 cents, and on wire and nails the interstate rate from Vicksburg is 50 cents, where the Galveston intrastate rate is 25 cents. To other points, such as Paris, Clarksville, Sulphur Springs, Longview, Mineola, Big Sandy, and Terrell, the mileage from Galveston is in excess of that from Vicksburg. The disparity in the rates is therefore apparent, and Vicksburg complained of the discrimination, but the Commission said:

> "It is not necessary to consider the rates and mileage from Galveston to the points in northeastern Texas named by the complainant. Those rates are intrastate rates and via other lines than those leading from Vicksburg, so that there can be no valid comparison between them."

Other cases might be quoted, but these are sufficient to show that continuously the Interstate Commerce Commission has disclaimed the jurisdiction here sought to be exercised, and its decision herein marks a radical departure from the views and practices obtaining since its creation. It can confidently be said that prior to the opinion of Judge Sanborn in the Minnesota case, no decision of any court, State or Federal, or of any governmental administrative body had held that a state made rate applicable solely to intrastate commerce was an interference with interstate commerce, or subject to Federal jurisdic-

tion, because it might have an incidental or consequential effect upon interstate movements or traffic.

The facts in the case of Alabama & Vicksburg R'y Co. v. Mississippi Railroad Commission, 203 U. S., 496, are much more proximate in their relation to interstate commerce than those in the case at bar. There, grain from the northwest was shipped to and concentrated at Vicksburg, and on such grain a re-billing rate of 3½ cents per hundred pounds was made on this traffic shipped from Vicksburg to Meridian, Miss., applicable, however, only in cases of shipments over the Vicksburg, Shreveport & Pacific. The Mississippi Commission thereupon made an order to the effect that all grain products shipped from Vicksburg to Mississippi should bear the same rate. This order was attacked as a direct interference with interstate commerce, but this court, speaking through Mr. Justice Brewer, held that the Railroad Commission of Mississippi was within its legal rights.

See also:

Ames v. U. P. R. R. Co., 64 Fed. Rep., 177.
S. P. Co. v. R. R. Commission, 193 Fed. Rep., 699.
L. & N. v. Siler et al., 186 Fed. Rep., 176.
Oregon R'y & Nav. Co. v. Campbell, 173 Fed. Rep., 957.
Woodside v. Tonapah & G. R. Co., 184 Fed., 360.
St. L. & S. F. R'y Co. v. Hadley, 168 Fed., 341.
G. C. & S. F. R'y v. State, 204 U. S., 403.

II.

"The Texas intrastate rates complained of are not voluntary rates applied by the carriers, but are rates prescribed by the duly constituted authorities of the State of Texas, obedience to which is compelled by the Texas law, and such obedience cannot constitute an illegal descrimination under the act to regulate commerce."

The Texas intrastate rates which are held to be discriminatory were promulgated by the Railroad Commission of Texas. If the carriers should, under the Texas statutes, undertake to install higher rates, they are subject to a penalty as for extortion of not more than $5,000 on each shipment, by a suit of the State of Texas, and a penalty of not less than $125.00 nor more than $500.00 on each shipment accruing to the individual shipper. A further penalty accrues of not more than $5,000.00 for failing to observe the orders of the Railroad Commission. These Texas rates are observed under the severe compulsion of these penalties, and are in no sense voluntary rates. Under the decision of this court in the case of East Tenn., Va. & Ga. R'y Co. v. I. C. C., 181, U. S. 1, section 3 of the act to regulate commerce does not apply. This court, speaking through Chief Justice White, there said:

> "The prohibition of section 3 when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts, the result of conditions wholly beyond the control of the carriers."

To the same effect is the decision of the Interstate Commerce Commission In the Matter of Freight Rates Between Memphis and Points in Arkansas, 11 I. C. C. 180.

III.

"The Congress of the United States has no power under the Constitution of the United States to regulate or control purely intrastate commerce and rates."

The whole course of decision in all of the great rate

cases where the validity of State legislation and the action of State authority has been questioned, either as in conflict with the due process, or the commerce clause, of the Federal Constitution, presents no suggestion or intimation that Congress possesses the power to regulate purely domestic commerce. This historic fact, of course, weighs heavily as a rule of construction negativing the contention that in the act to regulate commerce it was intended to clothe the Interstate Commerce Commission with an authority never asserted or claimed by Congress itself. It it equally potent as an argument against the very existence of the power. Beginning with Munn v. Illinois, 94 U. S., 113, and proceeding step by step through Stone v. Farmers Loan & Trust Company, 116 U. S., 307; C. M. & St. P. R'y Co. v. Minnesota, 134 U. S., 418; Dow v. Beidelman, 125 U. S., 680; Chicago & Grand Trunk R'y v. Wellman, 143 U. S., 349; Reagan v. Farmers Loan & Trust Company, 154 U. S., 362; St. L. & S. F. R'y v. Gill, 156 U. S., 649; and Smythe v. Ames, 169 U. S., 466, each and every case proceeds upon the theory and assumption that the right to control purely intrastate and domestic commerce is a high sovereign power of the individual State, and that within this domain the jurisdiction of the State is as complete and exclusive as is that of the Federal government in the regulation of commerce among the States. Equally strong is the proposition in all the great tax cases, and in those where the action of the State, attacked as an interference with interstate commerce, finds its basis in the police power of the State, is the assertion of the proposition that in order to constitute an interference with, or burden upon, interstate commerce, the effect of the State's action must be proximate and direct, and that a mere incidental or consequential effect upon inter-

state commerce does not constitute an invasion of the Federal domain. Time and again, this court has stated the principle that railroad building and rate making are, in reality, functions of the State itself, delegated by legislative authority to private carriers, and that the regulation of rates is a high sovereign power of the State, and where the exercise of this high power is confined to commerce wholly within the State it does not fall within the terms of the Commerce clause of the Constitution. This thought is aptly expressed in the dissenting opinion in Wabash R'y Co. v. Illinois, 118 U. S., 557:

> "It is only for the sake of convenience that the State lets out its railroads to private corporations. It might construct them itself. Suppose it had done so in this case, could not the State have instituted such rate of freight and fare as it pleased? Certainly it could. It might have made them uniform, as the present law requires them to be, but it might have made them discriminative between different places, and no one could have called it to account. Instructions in the form of laws or in the form of orders made by the State body might have been given to the superintendent of the road, acting in behalf of the State, to adopt the one course or the other. Could the agents of the State, acting under such instructions, have been interfered with by the judicial department on the ground of unconstitutionality? Certainly not, unless discriminations were made to the prejudice of citizens of other States or the produce of other States. The State of New York built and owns the Erie Canal. Did any court ever attempt to control that State in its regulation of tolls on the canal, even though made for the purpose of affecting the rail movement of goods on the canal and railroads of the State? We presume that no such attempt was ever made or would ever be successfully made."

Sands v. Manistee River & Improvement Co. 123 U. S., 288, involved a law of the State of Michigan permitting

improvements of rivers and the charging of tolls for the use thereof upon schedules of charges submitted to or approved by a State board of control. Suit was brought for such tolls, and the statute attacked as a regulation of interstate commrece. This court, by Justice Fields, said (295):

> "The Manistee River is wholly within the limits of the State of Michigan. The State can, therefore, authorize any improvement which in its judgment will enhance its value as a means of transportation from one point of the State to another. *The internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government.*"

In Hopkins v. United States, 177 U. S., 578, the regulations of the Kansas City Livestock Exchange were attacked as in violation of the Sherman Anti-Trust Act. It was held that the effect of these regulations upon interstate commerce was too remote and indirect to come within the Federal jurisdiction. Justice Peckham, delivering the opinion of the court, says (597):

> "But in all the cases which have come to this court, there is not one which has denied the distinction between a regulation which directly affects and embraces interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transactions of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of the charge for the use of the facility."

In United States v. Knight, 156 U. S., 1, which was a proceeding under the Federal anti-trust act, this court, in holding that manufacture is not commerce, and speaking through Chief Justice Fuller, page 13, said:

> "It is vital that the independence of the commerce

> power and of the police power and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the State as required by their dual form of government, and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality."

In the case of Austin v. Tennessee, 179 U. S., 343, this court, in sustaining the cigarette act of the State of Tennessee, said (349):

> "We have had repeated occasion to hold, where State legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that if the action of the State legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected though it might interfere indirectly with interstate commerce."

In Texas & Pacific Railway v. I. C. C., 162 U. S., 197, in discussing the first section of the act to regulate commerce, the court, while asserting the full jurisdiction of Congress, was careful to exclude from that jurisdiction commerce wholly within a State. At page 212 it said:

> "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce *(excepting commerce wholly within a State)*, as well that between the States and Territories as that going to or coming from foreign countries."

As shown in the cases above cited, the Interstate Commerce Commission has, prior to the rendition of the order

herein involved, been forceful in its repudiation of any authority to act upon commerce between points wholly within a given State, whatever might be the indirect effect upon interstate commerce. This is well illustrated in New Jersey Fruit Exchange v. Central Railroad Company of New Jersey, 2 I. C. R., 84. Complaint was made by peach shippers of New Jersey of rates on peaches moving from New Jersey points to New York. It appears that the peach shipments formerly moving directly from New Jersey points of origin to the city of New York were at the time of the complaint delivered to consignees at Jersey City, and they were thereafter, by separate shipping arrangements, transported to New York. Here was a great and continuous stream of commerce moving, it is true, wholly between points in the State of New Jersey, but ultimately to an interstate point. Yet the Commission clearly disclaimed jurisdiction. That the rate from the interior point in New Jersey to Jersey City must indirectly affect the rate to New York could not, of course, be questioned. Nevertheless, the Commission held that it had no jurisdiction in the premises. This and subsequent decisions of the Interstate Commerce Commission are in line with that of this court in Gulf, Colorado & Santa Fe Railway Company v. State of Texas, 204 U. S., 403.

The Federal or State jurisdiction must, in the last analysis, rest upon a proposition of fact, to wit: Is the commerce regulated interstate commerce, or is it intrastate commerce? In the case at bar there is no contention that the commerce moving from Houston or from Dallas towards the Louisiana line is otherwise than purely State commerce. There is no contention that the rates prescribed by the Railroad Commission of Texas are different from the rates prescribed for all other citizens of the

State for the same distance and upon the same commodity. And, it is submitted that the mere fact that these rates operate incidentally to give the citizen of Texas distributing his goods to Texas points an incidental advantage over the citizen of Louisiana who wishes to compete in the same territory, cannot in any just or constitutional sense be an interference with interstate commerce. There is no discrimination against the citizen of Louisiana as such. There is no interference with interstate commerce as such. A just and general rule is prescribed by the rate-making authority of the State applicable to all of its citizens, and finding its justification in the local and domestic conditions surrounding the traffic. If these rates enable the citizen of Texas to distribute his products to points within the State at a less rate per mile than can the citizen of another State who wishes to ship in the same territory, the disadvantage of the latter does not constitute such an interference with interstate commerce as justifies congressional action under the commerce clause, but is a mere incident to our dual system of government.

The Employers Liability Cases, 207 U. S., 463, clearly define the rule here sought to be invoked. There the lack of Federal jurisdiction was based upon a simple issue of fact. While the right to regulate and control instrumentalities of interstate commerce was clearly sustained, the absence of Federal power to regulate the liability of the carrier to a servant or agent not engaged in interstate commerce was as clearly asserted, and because the act was general in its terms, and applicable to those engaged in both interstate and intrastate commerce, it was held invalid. It is said:

"From this it follows that the statute deals with

> all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trading or commerce between States, and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form the statute is addressed to individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do. That is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce. * * * The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside the power of Congress to regulate commerce."

In reaching the conclusion that the act was unconstitutional, the court quotes the following passage from Gibbon v. Ogden, 9 Wheat., 196, which is peculiarly applicable here:

> "It is not contended that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to, or affect, other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce *which concerns more States than one.* * * * The genius and character of the whole government seems to be that its action is to be applied to all the internal concerns of the nation and to those internal concerns which affect the State generally but not to those which are completely within a particular State, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

If the assertion of the Federal power contended for by the majority of the Interstate Commerce Commission, and upheld by the Commerce Court in the decree appealed from, is here sustained, and the principle is established that every State rate which incidentally affects interstate traffic may be withdrawn from the jurisdiction of the State by congressional action, then as a practical matter, the control of the State over its internal commerce has been lost. As illustrated by one of the cases above referred to, every state rate from Galveston to the interior of Texas has an incidental, but nevertheless very appreciable effect upon the interstate rates into Texas from St. Louis and other distributing points. A vast commerce moves from the eastern, middle and Atlantic States through the port of New York, directly to Galveston, and thence is distributed over the vast domain of Texas. Much of this commerce moves on a port to port ship's bill of lading to Galveston. Some of it moves on a through bill of lading by rail to New York, and water to Galveston. From Galveston, under the rates prescribed by the Railroad Commission of Texas, it moves to interior points in that State. In order to compete with these eastern shippers, carriers from St. Louis, Chicago, and other western points of distribution, must, by the through interstate rates from those points to Texas, meet the rates made by the combination of the water rate to Galveston and the local Texas rate to the competitive Texas territory. The local Texas rate prescribed by the Railroad Commission of Texas, therefore, has an appreciable effect on the interstate rate, for example, from St. Louis, Kansas City and Chicago. Again, goods are shipped from eastern territory by water from Atlantic seaports, on through rates, and through bills of lading, to Texas points. By taking

possesion of his goods at Galveston, and shipping to the interior Texas points on the local Texas Railroad Commission rate, the Galveston distributor may be able to obtain a less total charge to the final point of destination than the shipper who uses the through rate and the through bill of lading from the initial point. The purely internal or domestic rate, therefore, in any State with ports of importance, must always have an appreciable influence upon the interstate rate. And, if for that reason Congress has power to regulate these purely internal rates, then the State authorities are shorn of those powers which alone can justify their existence. The illustration of movements to and from ports is far more favorable to the existence of the Federal jurisdiction than are the facts of the case at bar. Because in these cases it might be contended with much force that the movement being practically continuous, a mere incidental interruption for the purpose of taking possession of the article moved, does not deprive the commerce of its essential nature. In the case at bar no such facts exist. The commodity moved from Houston and Dallas, in the direction of Shreveport, on the local Texas rates, is not moved in the stream of interstate commerce. It is a part of the general mass of property in the State. At no point in the transit does the character of interstate commerce attach to it, and while conceding to the utmost the plenary jurisdiction of Congress as to all matters of interstate commerce, it is submitted that as to such a movement the facts do not, and cannot, exist to which that jurisdiction can attach. In view of the legislative and judicial history of this subject matter, it is not hazarding too much to say that, had it been conceived that the contention would be advanced that Congress had the power, or that it intended in the act to regulate com-

merce to confer upon an administrative agency of the government the right to nullify the acts of State authorities applicable to movements confessedly purely intrastate because of their incidental effect upon commerce, interstate in its character, that the act would never have become a law, and the Interstate Commerce Commission never created.

It is believed, however, that this last and most serious question need not be reached in the determination of this case, for the reason that the language of the act itself, as construed by this court, does not confer upon the Interstate Commerce Commission the authority here sought to be exercised. And that, even conceding the jurisdiction of the Commission, the involuntary obedience of the carriers to intrastate rates made by the Texas Railroad Commission cannot constitute an undue or illegal discrimination as against an interstate rate found to be reasonable by the Interstate Commerce Commission.

Respectfully submitted with the prayer that the decree of the United States Commerce Court dismissing appellants' bill be reversed, and that that court be directed to enter its decree enjoining the enforcement of the order of the Interstate Commerce Commission in so far as it affects the commodity rates from Shreveport to Texas points and the same rates as apply from Houston and other points on its line towards Shreveport, for equal distances.

Marvell Counts
James D. Watson
Miriam M. Garwood
Attorneys for Appellants.

BAKER, BOTTS, PARKER & GARWOOD,
Of Counsel.

EXHIBIT A.

205 Federal Reporter, 380.

TEXAS & P. R'Y Co. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, et al., Intervenors).

(Commerce Court, April 25, 1913.)

No. 68.

1. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWERS—DISCRIMINATION BETWEEN LOCALITIES.

The proviso in Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), that the act shall not apply to transportation wholly within one State, is a mere disclaimer of any intention on the part of Congress to exceed its constitutional power, and was not designed to limit the provisions that are within the power which Congress could exercise, and the proviso does not prevent the application of the third section in prohibiting undue discrimination between localities to cases where such discrimination is brought about by State action, requiring a reduction in intrastate rates.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85*]

2. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWERS—DISCRIMINATION BETWEEN LOCALITIES.

Though the preference given to one locality or the disadvantage to which the other is subjected is not due to the voluntary act of the carrier, and although the interstate rates in force may be reasonable in themselves, the Interstate Commerce Commission can correct the discrimination by requiring a just equalization in rates between the two localities.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85*.]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

3. Commerce (§ 8*)—State Regulation of Rates—Validity—Interference with Interstate Commerce.

The right of a State to control the movement of its internal commerce, and the instrumentalities employed in such movement, is not unlimited, and the action of a State in reducing railroad rates on intrastate shipments below what is justly compensatory to the carriers, with the purpose and effect of securing unjust and arbitrary advantage to dealers within the State over competitors in other States, directly affects interstate commerce, and encroaches on the field in which Federal authority is supreme and exclusive, and the rates so made cannot be held binding upon the carriers affected.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

4. Power of Interstate Commerce Commission over Involuntary Rates.

While Congress may constitutionally confer upon the Interstate Commerce Commission the power to prevent an undue prejudice between communities, resulting from varying interstate and intrastate rates, even though one or the other be not voluntarily established, such power has not yet been granted. Such an order cannot be based upon a compelled rate, whether interstate or intrastate, and whether compelled by competition, by statute, by court decree, or by order of a Commission. (Per Mack, J.)

5. Voluntary Acquiescence in Compelled Rates.

The present order can be upheld only upon the theory that the failure of the railroads to attack the Texas Commission rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be decreed to have been voluntarily made by the railroads. (Per Mack, J.)

Petition by the Texas & Pacific Railway Company against the United States of America, in which the Interstate Commerce Commission, the Railroad Commission of Louisiana, the St. Louis Southwestern Railway Company, and others, intervene. On final hearing. Petition dismissed.

For opinion of Interstate Commerce Commission, see Meredith v. St. Louis Southwestern R'y Co., 23 Interst. Com. Comm. R. 31.

Henry G. Herbel, of St. Louis, Mo. (Fred G. Wright, of St. Louis, Mo., on the brief), for petitioner.

Winfred T. Denison, Asst. Atty. Gen (Thurlow M. Gordon, Sp. Asst. Atty. Gen., on the brief), for the United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Luther M. Walter, of Chicago, Ill. (R. G. Pleasant, Atty. Gen., and W. M. Barrow, Asst. Atty. Gen., on the brief), for Railroad Commission of Louisiana.

Before KNAPP, Presiding Judge, and HUNT, CARLAND and MACK, Judges.

KNAPP, Presiding Judge. The question to be decided in this case has been so thoroughly discussed by the Commission, and kindred questions have been so fully considered in various cases recently decided or now pending in other courts, that little can be profitably said beyond a statement of our conclusions.

There is no dispute about the material facts, and they are easily comprehended. The interstate rates of petitioner from Shreveport, La., to Dallas, Tex., and intermediate points on its line, are very much higher in proportion to distance than the State rates of petitioner from Dallas to the same intermediate points in the State of Texas. For example, the rate on farm wagons from Shreveport to Marshall, a distance of 42 miles, is 56 cents per 100 pounds, while the rate from Dallas to Marshall, a distance of 147 miles, is only 36.8 cents. Under such an adjustment of freight charges it is obvious that Shreveport is severely, if not fatally, handicapped in its competition with Dallas for the trade of the intervening territory, most of which is situated in the State of Texas. It appears that operating conditions are substantially the same throughout the entire line and in both directions

between these two cities, and petitioner makes no claim that the disparity in rates can be justified by differences in the cost of transportation. Indeed, it seems to be conceded—and certainly no other inference is permissible—that the rate situation here in question would clearly constitute undue prejudice to Shreveport and undue preference to Dallas, within the meaning of the third section of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), provided that section be applicable, if the intrastate rates from Dallas, like the interstate rates from Shreveport, were voluntarily established by the carrier. But while the discrimination in fact against Shreveport is admitted, the contention is made that as matter of law it is not and cannot be undue, or otherwise in violation of the act, because the intrastate rates in question are made by authority of the State of Texas, and the petitioner is under legal compulsion to observe them. In other words, it is insisted that a violation of the third section cannot be predicated upon a rate relation, however unjust, which is brought about, not by the voluntary action of the carrier, but by the command of a State which the carrier is constrained to obey.

In this suit the order of the Commission is sought to be set aside only so far as it affects commodity rates, and the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the services rendered; that is, rates which conform to the requirements of the first section of the act, and which, therefore, petitioner may justly and lawfully charge. From this finding, in connection with other facts stated, it seems necessarily to follow that the intrastate commodity rates of petitioner from Dallas to the same destinations, which the Texas Commission has prescribed, are materially less than petitioner is justly entitled to charge; and this involves the further consequence that the Texas Commission, by imposing

upon petitioner lower rates than it should rightfully receive, has, in point of fact, placed an undue burden upon interstate commerce, and thereby obstructed the freedom of its movement. If this is a correct analysis of the situation, as is virtually admitted, it can hardly be doubted that the action which produces such result, whether intended or otherwise, is in derogation of the power and authority of Congress under the commerce clause of the Constitution.

The right of a State to control the movement of its internal commerce and the instrumentalities employed in such movement is not unlimited, as the Supreme Court has repeatedly declared. In the first case which involved the scope and meaning of the commerce clause, Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, the line of demarkation between State and Federal power was defined by Chief Justice Marshall in the following language:

> "It is not intended to say that these words [commerce among the States] comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to *or affect* other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to *that commerce which concerns more States than one.* * * * The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the States generally*, but not to those which are completely within a particular State, *which do not affect other States*, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." (Italics ours.)

This definition has been uniformly accepted and the language itself quoted with approval in a number of cases. The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999; The Lottery Cases, 188 U. S. 321, 346, 23 Sup. Ct. 321, 47 L. Ed.

492; The First Employers' Liability Cases, 207 U. S. 463, 493, 28 Sup. Ct. 141 52 L. Ed., 297. And quite recently, in The Second Employers' Liability Cases, 223 U. S. 1, 54, 32 Sup. Ct. 169, 177 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), Mr. Justice Van Devanter, after quoting to the same effect from McCulloch v. Maryland, 4 Wheat. 426, 4 L. Ed. 579, remarks that "particularly apposite is the repetition of that principle in Smith v. Alabama," 124 U. S. 465, 473, 8 Sup. Ct. 564, 566 (31 L. Ed. 508), where it is stated as follows:

> "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers, which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

In the light of these decisions, and many others of similar import, it seems clear to us that Congress is invested with ample power to prevent or remove such a discrimination as is here considered. This is not seriously disputed by petitioner, as we understand the position of counsel; but the contention is pressed that Congress has not exerted its power, even if the power be possessed, to the extent necessary to reach this particular kind of discrimination, and therefore the Commission's order should be set aside because in excess of its authority.

The power which Congress has exercised in this regard finds expression in the third section of the act to regulate commerce, as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in

> any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It would be difficult to frame a more comprehensive and unqualified declaration. It applies to all interstate railroads and makes unlawful every act which operates to the undue prejudice of any locality. Taken by itself, and giving to the language used its natural significance, the paragraph quoted brings within its condemnation the rate adjustment here involved, because that adjustment as a matter of fact is obviously prejudicial to the shipping interests of Shreveport. And it would follow from this view of the section that the Commission had authority to correct the ascertained injustice by making the order sought to be enjoined. The opposing view is based upon two general grounds which present the real controversy in this case, and which will now be briefly examined.

[1, 2] In the first place, it is said that the provisions of the third section, above quoted, are to be read in connection with the proviso in the first section, and that this proviso defines and limits the power which Congress intended to exercise by expressly excluding transportation "wholly within one State." In other words, the proviso is claimed to be an exception which exempts from regulation under the act the rates on intrastate traffic, and therefore deprives the Commission of authority to found a violation of the statute upon the relation between State and interstate rates, no matter what may be the effect of that relation upon the movement of interstate traffic. The proviso reads as follows:

> "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

The intent and meaning of this proviso has been quite fully discussed by this court in Denver & R. G. R. Co. v. Interstate Com. Com'n, 195 Fed. 968, and a conclusion therein reached substantially adverse to the contention here considered. In that case we said:

> "Section 1 not only subjects to the act, first, certain carriers, but also, second, certain transportation. The proviso relates, not to the carriers, but to the transportation, and is therefore to be read in connection with the second clause of the section, and not with the first. * * *
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> "Then, out of abundant caution, as it seems, and by way of disclaimer of any authority over a carirer that confined its business to one State, and was not engaged in such interstate business as would bring it within the first clause, the proviso was added. * * *
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> "The proviso, therefore, must be regarded as a disclaimer, and not as an exception. It could not, of course, be an exception to the second grant of jurisdiction over certain transportation, and it does not in any way refer to the first grant of jurisdiction over certain carriers, either by way of disclaimer of by way of exception. * * *
>
> "This construction gives consistent and appropriate meaning to those provisions of the first section which define the scope and application of the entire enactment. It sustains the act as a comprehensive scheme of regulation, designed to include all interstate transportation wholly by railroad, or partly by railroad and partly by water, when both are used under a common arrangement, *and to exempt only that intrastate transportation which is not within the power of Congress to regulate.*"

Adhering to the views then expressed, which are summed up in the last paragraph quoted, we hold that this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the act to regulate commerce, to exceed its constitutional power, and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect to such matters as are here in dispute. If this construc-

tion be correct, it follows that the proviso in no way prevents the application of the third section to the facts of this case, and therefore it was within the authority of the Commission to make the order in question.

It is argued in the second place, as above stated, that the "undue preference" and "undue prejudice" which are declared unlawful by the third section of the act, as that section has been construed by the Supreme Court, can be predicated only upon the voluntary action of the carrier, and therefore the lower rates from Dallas than from Shreveport are not in violation of the third section, whatever may be the resulting disadvantage to Shreveport shippers, because such lower rates are not voluntarily accorded, but are imposed upon petitioner against its will by the Texas Commission.

This contention is based upon several decisions of the Supreme Court, particularly East Tenn., etc., R'y Co. v. Interstate Com. Com'n, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed., 719, and cases there cited, and attention is called to the paragraph in the opinion in that case (181 U. S. 18, 21 Sup. Ct. page 522, 45 L. Ed. 719) in which the following language is used:

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

It will be observed that this case arose under the long and short haul clause of the original fourth section of the act, and involved the meaning of the phrase "under substantially similar circumstances and conditions," which was eliminated by the amendment of 1910. Act June 18, 1910, c. 309, § 8, 36 Stat. 547 (U. S. Comp. St. Supp. 1911, p. 1288). The real question at issue was whether competition at the longer distance point constituted, or could constitute, a dissimilarity or circumstances and condi-

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tions which relieved the road serving the shorter distance point from the obligation imposed by the fourth section, and the Supreme Court answered that question in the affirmative. Examination of the opinion discloses clearly, as we think, that the convincing reason for this conclusion was the fact that the carrier complained of had not caused and was in no way responsible for the discrimination against the shorter distance locality. That discrimination as was shown, resulted wholly from the lower rates accorded by independent carriers reaching the farther point by other and different routes; and accordingly it was held that the carrier in question, if its rates to the nearer point were reasonable, was not violating the act by meeting at a more remote point conditions there existing which it did not create and could not control. Manifestly the factor deemed decisive in that case is wholly absent from the case at bar, and therefore the ruling then made, notwithstanding the statement above quoted from the opinion, cannot be accepted as sustaining petitioner's contention. Moreover, the administrative authority of the Commission has been materially increased by the amendments of 1906 and 1910, as the Supreme Court observed in the recent Procter & Gamble Case, 225 U. S., 282, 297, 32 Sup. Ct. 761, 56 L. Ed., 1091, and it may be open to doubt whether decisions under the former fourth section would be followed in cases arising under the amended statute.

[3] This, of course does not meet the argument, based upon the different state of facts here presented, that petitioner is under compulsion as respects the State rates in question, and therefore not chargeable with any violation of law because those rates are relatively much lower than its interstate rates from Shreveport. In the last analysis this claim of coercion would seem to beg the question to be decided, since it assumes that petitioner is bound at all events to observe the rates fixed by the Texas Commission although the order sought to be enjoined

justifies the application of higher charges. But if the action of the Texas Commission regarding these intrastate rates is in derogation of the regulating power of Congress, the petitioner is not bound by that action, but has the right to readjust its schedules in conformity with the order of the Interstate Commerce Commission.

In the report upon which that order is based the Commission has found, upon convincing proofs therein recited, that the local rates here involved were imposed by the Texas Commission for the purpose of favoring the industries and communities of that State. Indeed, the evidence is said "to demonstrate that Texas has a policy of her own with respect to the protection of home industry, which has been made effective by consistent and vigorous action on the part of her Commission." And in this policy, as is further found, the petitioner and other carriers in like situation have apparently acquiesced. This plainly means, nor is it seriously disputed, that these Texas rates were prescribed, not with reference to their intrinsic reasonableness, or on the basis of just compensation for the service rendered, but with the undisguised intention of giving preference and advantage to the dealers of that State as against their competitors in Louisiana and other tSates. As Commissioner Lane puts it:

> "The Texas Commission is acting in loco parentis to the jobbing interests of Texas."

It also means, as the record indicates, that the rates so established have been accepted by petitioner without more, at most, than a perfunctory protest. In view of these uncontradicted facts, we are constrained to reject the plea of compulsion, not merely or mainly because petitioner has assented to the protective policy of the Texas Commission, but because that policy directly affects other States, and the flow of commerce from those States, and thereby encroaches upon the field in which Federal authority is exclusive and supreme. To hold otherwise in this case is virtually to admit that the purpose of the Federal act

may be thwarted and its operation made ineffective by the laws and administrative effort of the State of Texas. It is evident, as already stated, that these Texas rates were designed and have the necessary result of securing unjust and arbitrary advantage to the shippers for whom they were provided, by restricting the movement of commodities from other States and measurably excluding outside dealers from competing for trade in Texas territory. The effect of this action by the Texas Commission is not merely incidental and unimportant, but direct, substantial, and to an extent prohibitive. In our judgment it is a positive interference with interstate commerce, which Congress alone has power to regulate, and constitutes a violation of the law which Congress, in the exercise of its power, has duly enacted. The pervading purpose of that law was to prevent carriers subject to its provisions from indulging in unfair and burdensome discriminations against persons and localities engaged in interstate commerce.

But if such a patent discrimination as this case discloses cannot be reached, because it is brought about by a State Commission, the law fails in a most important respect to accomplish its wholesome purpose. Moreover, if one State Commission may create and perpetuate such a discrimination, other State Commissions may take similar action for similar reasons, with results which would greatly impair, and indeed largely defeat, the effectiveness of Federal regulation. To say that conditions thus arising do not offend the Federal law, and cannot be corrected by the Commission appointed to administer that law, is to say in effect that State authority is superior to Federal authority when they come in conflict, whereas the reverse proposition has been repeatedly and invariably affirmed by the Supreme Court of the United States.

It is not claimed that the precise question here presented has been passed upon by the Supreme Court, but in various decisions of that court, principles have been laid down which seem to us clearly applicable if not control-

ling. For example, in the Eubank Case, 184 U. S. 36, 22 Sup. Ct. 280, 46 L. Ed. 416, Mr. Justice Peckham uses the following language:

> "We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident."

Later, in the Pullman Company Case, 216 U. S. 65, 30 Sup. Ct. 235, 54 L. Ed., 378, Mr. Justice (now Chief Justice) White states certain propositions which are said to be "so conclusively established by the previous decisions of this court as to be now beyond dispute." Among them are these:

> "A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. * * * Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce, if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on."

And more recently, in Southern R'y Co. v. United States, 222 U. S., 23, 32 Sup. Ct., 4, 56 L. Ed., 72, affirming the validity of the Safety Appliance Acts, Mr. Justice Van Devanter states the principle governing the question there considered, as follows:

> "And this is so, not because Congress possesses any power to regulate intrastate commerce as such,

but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it; that is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

This court, also, in Penn. R. Co. v. Interstate Com. Commission, 193 Fed., 81, following the Illinois Central Case, 215 U. S., 452, 30 Sup. Ct., 155, 54 L. Ed., 280, upheld orders of the Commission relating to the distribution of coal cars in times of shortage. And in reply to the argument that the carrier could not comply with the orders in question without violating a statute of the State we said:

"It may also be true that the enforcement of regulations in conformity with these orders, if applied to cars for intrastate as well as interstate shipments, would result in some conflict with the duties of petitioner under the laws of Pennsylvania; * * * but, if this is or proves to be the case, it furnishes no ground for our interference, since Federal authority to the full extent that it may be exerted supersedes and limits State authority."

It is true that the laws and orders involved in these decisions pertain to the physical operation of interstate railroads, and not to the relations between State and interstate rates; but in our opinion the underlying question is essentially the same in both classes of cases, and the doctrine of the supremacy of Federal authority should have the same controlling application in the latter as in the former. If State regulation under State laws, respecting such matters as safety appliances, car distribution, and the like, must be subordinated to and may be virtually annulled by national regulation under the national laws now in force, there is even greater reason for asserting the

sufficiency of the existing acts of Congress, and the authority of the tribunal by which they are administered, to remove such a palpably unjust and injurious discrimination in freight charges as is here presented, although that discrimination is caused by the action of the State Commission. This is not to interfere with any power of regulation which a State may rightfully exercise, which does not "affect other States," or materially impede the flow of commerce from one to another, but to give complete and adequate potency to the law which Congress has enacted in pursuance of its plenary and exclusive power to regulate commerce "among the several States." As is said by Sanborn, Judge, in Shepard v. Northern Pac. Ry. Co. (C. C.) 184 Fed. 795, after referring to the Eubank Case, *supra:*

> "By the same mark, because it is a direct regulation of interstate commerce, the nation may regulate and prohibit discriminations wrought by an undue difference between interstate and intrastate rates, although such regulation or prohibition may also to some extent affect and regulate intrastate commerce. For to the extent necessary completely and effectually to regulate interstate commerce the nation by the Congress and its courts may affect and regulate intrastate commerce."

It is the duty of an interstate railroad so to adjust its schedules that all dependent shippers and communities, regardless of imaginary State lines which may divide them, shall be able to use its facilities on relatively equal terms; and the Interstate Commerce Commission, in our judgment, is empowered by the present law to enforce the performance of that duty as occasion may require. The necessity for uniform, comprehensive, and adequate regulation, especially urgent in the vital matter of rate relations, compels assertion of the paramount authority of Congress and the appropriate exercise of that authority in those provisions of the act which are leveled against unjust discriminations, wherever existing or however

caused. Indeed, we see no escape from multiplied difficulties arising under our dual form of government, except by broadly defining the constitutional power of Congress, and its exertion as manifested in the enactment of the present law, and by upholding the full application of that law to such controversies as the one here considered. We are therefore in accord with the views of Commissioner Lane, speaking for the majority of the Commission, as expressed in the following extracts from his report:

> "An interstate carrier must respect the Federal law, and if it is also subjected to State law it must respect that in so far as it can without doing violence to its obligations under the national authority. Before us are carriers which undeniably discriminate directly against interstate traffic. To this charge they plead that all they have done was to obey the orders of a State Commission, as against which they were helpless. They appealed to no court for relief, nor to this Commission. When the State of Louisiana, after years of endurance, makes complaint to this body, these carriers make no showing of the reasonableness of their rates, other than that heretofore dealt with —a traffic adjustment equalizing gateways—and even in this defense all the carriers did not join. * * * While the Texas Commission has evidenced a policy of home protection for its own State cities, there is every evidence that the carriers moving into and within Texas accepted this policy as their own, claiming that not to have adopted it would have led to reprisal on the part of the State authorities. Such conditions may not continue under this act. The interstate carrier which adopts a policy, even under State direction, that makes against the interstate movement of commerce, must do so with its eyes open and fully conscious of its responsibilities to the Federal law, which guards commerce 'among the States' against discrimination."

The Interstate Commerce Commission investigated the complaint filed with that body on behalf of the shippers and dealers of Shreveport. In its report of that investiga-

tion, and upon proofs that seem to permit no other conclusion, the Commission found the fact of unjust discrimination as alleged, and duly made an order requiring its removal. The Commission also found by necessary inference, as its order clearly indicates, that the interstate commodity rates in question were not unreasonable, and this in effect sanctioned the continuance of those rates. It is likewise a necessary inference from the report and order that the unlawful discrimination against Shreveport, so far as commodity rates are concerned, was caused by the imposition of intrastate rates which are lower than petitioner is justly entitled to charge. This being so, it follows that petitioner is at liberty and has the right to comply with the Commission's order by making a proper increase of its Texas rates. Indeed, since its interstate rates are not excessive, such an increase appears to be the only method of compliance which would be just to both shipper and carrier.

When this order was made, upon the facts so ascertained and reported, it had the effect, in our judgment, of relieving petitioner from further obligation to observe the intrastate rates which the Texas authorities had prescribed. The petitioner was no longer under compulsion in respect of those rates, because the rate situation disclosed by the inquiry was subject in its entirety to the provisions of the Federal statute and the administrative control of the Commission. The order of the Commission therefore operated to release petitioner, as regards the intrastate rates in question, from the restraint imposed by the State of Texas; and thereupon petitioner became entitled, if it did not choose to reduce its interstate rates, to comply with the order by advancing its Texas rates sufficiently to remove the forbidden discrimination. Its obedience was due to the superior authority, and it ceased to be bound by any inconsistent obligations. Whether petitioner should have applied to the courts for relief in the premises, basing its application upon the Commis-

sion's order and the rights of petitioner thereunder, or could advance its Texas rates in the first instance, relying upon the order as a defense against and prosecution under Texas laws, is not for us to determine. It is sufficient to hold, as we do, that petitioner cannot resist the order on the ground of involuntary action, because the effect of that order was an exemption of these intrastate rates from Texas authority.

As was suggested at the outset, the general question here involved has been presented in numerous cases, more or less closely allied, and is perhaps the most conspicuous and important subject of current litigation. In the course of that litigation every decision of possible bearing has been repeatedly cited and every opinion critically examined, whilst the ablest lawyers in briefs and at the bar have exhausted the resources of argument. We can add nothing to what has been so often said, and deem it unnecessary to extend the discussion. In our judgment, the order in question was within the authority of the Commission, and ought not to be set aside.

The petition will therefore be dismissed.

MACK, Judge (concurring). I agree that an intrastate rate voluntarily established by the railroads may be the basis for an order of the Interstate Commerce Commission declaring such a rate to involve an undue prejudice as against an interstate rate, and requiring that the two rates be equalized. I fully agree, also, that Congress has the constitutional power and may by proper legislation grant to the Interstate Commerce Commission authority to prevent undue prejudice in interstate commerce resulting from a rate not in the true sense voluntary, and irrespective of whether it be interstate or intrastate.

In view, however, of the passage cited from E. R'y Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct., 516, 45 L. Ed., 719, and of the decision of this court in Atchison, T. & S. F. R'y Co. v. U. S., 191 Fed. 856, now pending on appeal in the Supreme Court, I am of the

opinion that the Interstate Commerce Commission under the legislation now in force cannot base such an order upon a compelled rate, whether interstate or intrastate, and whether compelled by competition, by statute, by court decree or by the order of a Commission.

In my judgment, the Texas State rates cannot be treated by the Interstate Commerce Commission as if they were absolutely null and void, even if upon direct attack in the State or Federal courts, they might be nullified and their enforcement permanently enjoined as infringing upon the exclusive power of the Federal government to regulate interstate commerce. In the absence of a judicial decree, temporarily or permanently suspending the force and effect of the Texas rates, the railroads would be compelled to obey them, just as the railroads and the public are required to observe interstate rates duly made and published by the railroads, even though they be such as would be set aside for unreasonableness, unjust discrimination, or undue prejudice on direct attack before the Interstate Commerce Commission.

[4] The order of the Interstate Commerce Commission, therefore, gives only an apparent, but not a real, alternative, either to raise the Texas rates, or to lower the interstate rates; in effect it compels the reduction of the interstate rates to a point far below what the Commission itself considers a reasonable rate, at least until a court of competent jurisdiction shall have enjoined the enforcement of the Texas rates. If the Texas rates here in question must necessarily be held to be involuntary and compelled, I should be of the opinion that the order of the Interstate Commerce Commission must be set aside.

[5] Inasmuch, however, as there seems to be some basis, though slight, for the view that the failure of the railroads to attack the Texas rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be said to have been not compelled, but voluntary, in the sense of having been voluntarily assent-

ed to, instead of having been actively attacked, and inas much as the conclusions of my Brethren are based in part at least upon this view, I concur, for this reason only, in upholding the Commission's order.

HOUSTON E. & W. T. R'Y Co. et al., v. UNITED STATES (INTERSTATE COMMERCE COMMISSION et al., Intervenors).

(Commerce Court, April 25, 1913.)

No. 67.

Petition by the Houston East & West Texas Railway Company and others against the United States of America, in which the Interstate Commerce Commission, the Railroad Commission of Louisiana, the St. Louis Southwestern Railway Company, and others intervene. On final hearing. Petition dismissed.

For opinion of Interstate Commerce Commission, see Meredith v. St. Louis Southwestern R'y Co. 23 Interst. Com. Comm. R. 31.

H. A. Scandrett, of Chicago, Ill., and H. M. Garwood, of Houston, Tex., for the petitioners.

Winfred T. Denison, Asst. Atty. Gen. (Thurlow M. Gordon, Sp. Asst. Atty. Gen., on the brief), for United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Luther M. Walter, of Chicago, Ill. (R. G. Pleasant, Atty. Gen., and W. M. Barrow, Asst. Atty Gen., on the brief), for Railroad Commission of Louisiana.

E. B. Perkins, of Dallas, Tex., S. H. West and Roy F. Britton, both of St. Louis, Mo., Daniel Upthegrove, of Dallas, Tex., Joseph M. Bryson, of St. Louis, Mo., and Alex. S. Coke and A. H. McKnight, both of Dallas, Tex., for intervening carriers.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

KNAPP, Presiding Judge. This case involves the same question as Texas & Pacific R'y Co. v. United States et al., 205 Fed., 380, just decided. For the reasons stated in the opinion in that case, the petition will be dismissed.

CONTENTS OF BRIEF.

List of Cases Cited in Brief.

IN THE

Supreme Court of United States

October Term, 1913.

No. 568.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL.,

Appellants,

versus

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

Appeal from the United States Commerce Court.
Brief for Appellants.

This is a companion case to Case No. 567 pending in this Court styled,

> "Houston East & West Texas Railway Company, and Houston & Shreveport Railroad Company, Et. Al., Appellants,
>
> vs.
>
> The United States, The Interstate Commerce Commission, Et. Al., Appellees."

and the same questions are involved in both causes.

This cause involves an appeal from a decree of the United States Commerce Court, of date April 25, 1913, dismissing bill for injunction filed by appellants to restrain the enforcement of an order of the Interstate Commerce Commission.

On the 8th day of March, 1911, the Railroad Commission of Louisiana filed a petition with the Interstate Commerce Commission against The Texas & Pacific Railway Company, the Houston East & West Texas Railway Company, the Houston & Shreveport Railroad Company, the St. Louis & Southwestern Railway Company, the St. Louis & Southwestern Railway Company of Texas, the Eastern Texas Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, the Gulf, Colorado & Sante Fe Railway Company, and the International & Great Northern Railway Company, complaining that these carriers discriminated in the rates carried on the various classes and commodities of traffic from Shreveport to Texas, in that the rates charged by the carriers from Texas distributing centers, such as Houston, Dallas and other points in the direction of Shreveport, to points within the State of Texas, the trade of which was in competitive territory between such Texas distributing centers and Shreveport, were less for equal distances than the rates carried by such carriers on the same classes and commodities from Shreveport to such Texas competitive points, and that the Texas intrastate rates applied between such Texas points were less under substantially similar conditions than the interstate rates from the city of Shreveport, in the State of Louisiana, to such competitive points. The prayer of the complainants was that the Interstate Commerce Commission establish

the same basis of rates of transportation between Shreveport and east Texas points as was accorded by the defendants to Texas competitors of Shreveport interests in the same line of business for the same distance. Complaint was also made that the interstate rates from Shreveport to such Texas points were unreasonably high. The Interstate Commerce Commission, after due and regular hearing, made its report and order upon this complaint on March 11th, 1912 (see 23 I. C. C., page 31). (Tr., 19-60). It was found therein that the class rates complained of out of Shreveport to the points on the Texas & Pacific mentioned in the order, and to points on the Houston East & West Texas Railway and the Houston & Shreveport Railroad, were unjust and unreasonable, and an order was made fixing reasonable rates on the several classes for the several stations on the Texas & Pacific Railway from Shreveport to Orphans Home, Texas, and from Shreveport, on the Houston East & West Texas Railway, to Houston, Texas. It was not found that the commodity rates complained of from Shreveport to the several Texas points were unreasonable, and the order of the Interstate Commerce Commission with regard to the commodity rates is based solely upon the proposition that the Texas intrastate rates applied by the carriers to and from Dallas, Houston and other distributing centers, to the points within the State of Texas, are less for substantially similar distances than the interstate rates from Shreveport to said points, and that thereby the intrastate Texas rates applied by the carriers are discriminative as against the interstate rates. The order of the Interstate Commission, which runs only against the Texas & Pacific Railway Company,

the Houston East & West Texas Railway Co., and the Houston & Shreveport Railroad held that the class rates complained of were unreasonably high, and prescribed reasonable rates. As stated, the commodity rates complained of were not found to be unreasonable **per se**, but the Texas & Pacific Railway Company, the Houston East & West Texas Railway Company, and the Houston & Shreveport Railroad Company, were required, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter, to cease and desist from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Dallas, Texas, and points on the Texas & Pacific Railway intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas, Texas, towards Shreveport, for an equal distance. And from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Houston, Texas, and points on the line of the Houston East & West Texas Railway and the Houston & Shreveport Railroad intermediate thereto, than are contemporaneously exacted for the transportation of such articles from Houston, Texas, towards Shreveport, for an equal distance. The effective date of this order has been suspended from time to time as to the commodity rates, complained of, and is still under suspension, but the order, in so far as it applied to the class rates, became effective May 1st, 1912, and is not here involved.

Separate suits to enjoin this order were filed by appellants, the Texas & Pacific Railway Company, and Houston East & West Texas Railway Company, Houston & Shreveport Railroad Company in the United States

Commerce Court. The Missouri, Kansas & Texas Railway Company of Texas, St. Louis & Southwestern Railway Company, and St. Louis & Southwestern Railway Company of Texas, intervened and were made parties to the suit filed by appellants Houston East & West Texas Railway and Houston & Shreveport Railroad Company, and are parties to this appeal.

While the bill for injunction against the order of the Interstate Commerce Commission (Tr., ...) attacked the entire order of the Commission, both as to the class rates and the commodity rates, the attack upon the class rates was abandoned. The Interstate Commerce Commission having found as a conclusion of fact that these rates were unreasonable, the proceedings before the United States Commerce Court were confined to an attack upon the order of the Interstate Commerce Commission, in so far only as it applied to the commodity rates. The order complained of finds that while the interstate commodity rates from Shreveport to the competitive Texas territory between Shreveport and Dallas on the line of the Texas & Pacific Railway, and between Shreveport and Houston on the line of the Houston East & West Texas Railway and the Houston & Shreveport Railroad, are not unreasonable **per se**; that inasmuch as the intrastate Texas rates between points wholly within the State of Texas intervening between Dallas and Houston and Shreveport are less for substantially similar distances, these intrastate rates are illegally discriminative against Shreveport, and the order of the Commission is that they be equalized. The order was attacked in the bill before the United States Commerce Court upon three grounds:

First, that the order of the Commission seeks to regulate and control purely intrastate rates, and that under the Act to Regulate Commerce, it was without authority or jurisdiction to make such order;

Second, that the intrastate Texas rate complained of were rates installed by the Railroad Commission of Texas, and that the carriers, having no authority under the law to disregard such rates, or to install other or different rates, the same were not voluntary rates, and did not, therefore, constitute an illegal discrimination;

Third, that the Congress of the United States is without power, under the Constitution of the United States, to regulate or control a purely intrastate rate.

These cases have been heard before the United States Commerce Court, and that Court, on April 25th, 1913, sustained the order of the Commission and dismissed the bills. The main opinion was rendered in the case of **Texas & Pacific Railway Company v. United States**, is reported in **205 Fed. Rep., 380**, and is attached hereto, marked Exhibit "A." An appeal having been duly prayed for, was allowed, and the cause is here presented for revision upon the following assignments of error:

First.

The Court erred in dismissing the petition of The Texas & Pacific Railway Company, petitioners herein, and the petitions of Missouri, Kansas & Texas Railway Company of Texas, St. Louis & Southwestern Railway Company and St. Louis & Southwestern Railway Company of Texas, intervening petitioners herein, and rendering final decree herein, sustaining and holding valid the order of the Interstate Commerce Commission in

Cause **No. 3,918, J. J. Meredith, Shelby Taylor and Henry B. Schreiber,** constituting the **Railroad Commission of Louisiana v. St. Louis Southwestern Railway Company, et al.,** of date March 11, 1912, for that:

Said order of the Interstate Commerce Commission was, and is, wholly invalid and void, in that the Interstate Commerce Commission having therein held that the interstate commodity rates from Shreveport, Louisiana, to the several Texas points in said order mentioned, were in all things reasonable, the said Interstate Commerce Commission is without power, authority or jurisdiction to order petitioner, The Texas & Pacific Railway Company to equalize rates imposed by the Railroad Commission of Texas between points wholly within the State of Texas, so as to conform said intrastate rates so made by and under the authority of the Railroad Commission of Texas to the said interstate rates applicable from Shreveport, Louisiana, to said points in Texas mentioned, and said Interstate Commerce Commission is without power, authority or jurisdiction to compel petitioners to reduce reasonable interstate rates to equalize same with lower intrastate rates installed by petitioners under the compulsion of the orders of the Railroad Commission of Texas.

Second.

The Court erred in dismissing said petition and sustaining said order of the Interstate Commerce Commission, for that:

The Interstate Commerce Commission is wholly without power or jurisdiction under the Interstate Commerce Act, approved February 4th, 1887, and acts amendatory thereof, to make any valid order

controlling or seeking to control rates wholly within the State of Texas made by the Railroad Commission of Texas, under and by virtue of valid laws of the State of Texas, duly authorizing it thereto.

Third.

The Court erred in dismissing said petition and sustaining the said order of the Interstate Commerce Commission, for that:

The Congress of the United States is wholly without power to enact any valid law controlling, or seeking to control, purely intrastate rates applicable to commerce moving wholly between points situated within the limits of the State of Texas, and made by the Railroad Commission of Texas in pursuance of authority duly and legally conferred by the Constitution and laws of that State.

Fourth.

The Court erred in dismissing said petition and entering its final decree herein, sustaining the order of the Interstate Commerce Commission therein complained or, for that:

The uncontradicted evidence herein shows that the commodity rates complained of from Dallas towards Shreveport and from Houston towards Shreveport, applied wholly to points within the State of Texas; that said rates were duly ordered and installed by the Railroad Commission of Texas, which had full power to make and install the same under the Constitution and laws of the State of Texas; and that petitioners and intervening petitioners, appellants herein, were forced, under

the compulsion of severe penalties, to apply the same, and petitioners and intervening petitioners are, and were, wholly without right, power or authority, under said laws of the State of Texas, to apply between said points any other or different rates than the rates so prescribed by the Railroad Commission of Texas, and the Interstate Commerce Commission having held in the order complained of that the commodity rates herein involved from Shreveport, in the State of Louisiana, to said points in the State of Texas, were in and of themselves reasonable, petitioners, and intervening petitioners, appellants herein, were and are wholly without power or authority to make or apply between said points in the State of Texas any other or different rates than those prescribed by the Railroad Commission of Texas, and the Interstate Commerce Commission was and is wholly without power, authority or jurisdiction to compel petitioners and intervening petitioners, appellants herein, to install or apply between said points wholly within the State of Texas, any other or different rates than those prescribed by the Railroad Commission of Texas.

Fifth.

The Court erred in dismissing the petition of The Texas & Pacific Railway Company and the petitions of the intervening petitioners herein, and in sustaining the order of the Interstate Commerce Commission herein complained of for that:

The Interstate Commerce Commission had no power or authority or jurisdiction to make any order on the petitioners or intervening petitioners herein, requiring or compelling them to remove the discrimination (if it be a discrimination), it not being an undue or illegal discrimination, of

which the Interstate Commerce Commission has, under Section 3 of the Act to regulate Commerce or any other valid law of the United States, power, authority or jurisdiction to remove.

These assignments present essentially the three propositions above referred to, to-wit:

The foregoing assignments of error are propositions of law within themselves, and present for consideration of this Court the following questions:

First, the Act to Regulate Commerce and the Amendments thereto does not confer upon the Interstate Commerce Commission jurisdiction or authority to regulate or control purely intrastate rates; on the contrary, the Interstate Commerce Commission act expressly eliminates intrastate rates from the jurisdiction of the Interstate Commerce Commission, and the order complained of in this cause is void for lack of jurisdiction.

Second, the Texas intrastate rates complained of are not voluntary rates applied by the carriers, but are rates prescribed by the duly constituted authorities of the State of Texas, obedience to which is compelled by the Texas law, and such obedience cannot constitute an illegal discrimination under the Act to Regulate Commerce.

Third, the Congress of the United States has no power under the Constitution of the United States to regulate or control purely intrastate commerce and rates; if Congress does possess such power it has never exercised same and never vested the exercise of such right in the Interstate Commerce Commission; on the contrary, it has expressly declined to invest such authority in the Inter-

state Commerce Commission, and has expressly taken from the Interstate Commerce Commission any right or jurisdiction over purely intrastate rates.

On December 19th, 1890, Section 2 of Article 10 of the Constitution of the State of Texas was amended so as thereafter to read as follows:

> "Railroads heretofore constructed, or which may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The Legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Pursuant to the constitutional authority here given, the Legislature of the State of Texas passed an act creating the Railroad Commission of Texas, approved April 21st, 1891, which act is brought forward in the Revised Statutes of 1911, Articles 6653-6716, inclusive.

The powers and duties of said Railroad Commission are set forth in Articles 6654-6663, inclusive. Said articles being here set forth:

> "Art. 6654. **Powers and Duties.**—The power and authority is hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and

regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.

"1. **To Classify Freights.**—The said Commission, shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes and subdivisions as may be found necessary and expedient.

"2. **To Fix Reasonable Rates.**—The Commission shall have power and it shall be its duty to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this chapter for the transportation of each of said classes and subdivisions.

"3. **Classification to be Uniform.**—The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this chapter.

"4. **May Fix Different Rates.**—The said Commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines, if found necessary to do justice, and may make rates for express companies, different from the rates fixed for railroads.

"5. **Rates for Connecting Lines.**—The said Commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this State reasonable joint rates of freight charges for the various classes of

freight and cars that may pass over two or more lines of such railroads.

"6. **Commission to Fix When There is Disagreement.**—If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passenger or cars over their lines, the Commission shall fix the pro rata part of such charges to be received by each of said connecting lines.

"7. **Old Rates to Exist Until Changed by the Commission.**—Until the Commission shall make the classification and schedules of rates as herein provided for, afterwards, if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classification and rates shall be put into effect in the manner provided for general classification and schedules of rates.

"8. **May Alter, Abolish, etc.**—The Commismission shall have power, and it shall be its duty, from time to time, to alter, change, amend or abolish any classification or rate established by it when deemed necessary; and such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals.

"9. **May Adopt Rules and Regulations.**—The Commission may adopt and enforce such rules, regulations and modes of procedure as it may deem proper to hear, and determine complaints that may be made against the classifications and rates, the rules, regulations and determinations of the Commission.

"10. **Empty Cars.**—The Commission shall make reasonable and just rates or charges for each railroad subject hereto for the use or transporta-

tion of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike, reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-ieght hours' notice to the consignee, not to include Sundays.

"11. **May Fix Rates for all Services.**—The Commission shall make and establish reasonable rates for transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any other railroad subject thereto.

"12. **Railways to Maintain Depots, etc.**—It shall be the duty of each and every railway subject to this chapter to provide and maintain adequate, comfortable and clean depots and depot buildings at its several stations, for the accommodation of passengers; and said depot buildings shall be kept well lighted and warm for the comfort and accommodation of the traveling public, and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freight handled by said roads; provided that this shall not be construed as repealing any existing laws on the subject.

"Art. 6655. **Notice to be Given when Rates Fixed.**—Before any rate shall be established under this chapter, the Commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rate shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done, and it shall have process to enforce the attendance of its witnesses.

All process herein provided for shall be served as in civil cases:

"1. **May Fix Rules for All Investigations.**—The Commission shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of of railroad companies and other parties before it, in the establishment of rates, orders, charges and other acts required of it under this law; provided, no person desiring to be present at any such investigation by said Commission shall be denied admission.

"2. **May Administer Oaths, Etc.**—The chairman, and each of the Commissioners, for the purposes mentioned in this chapter, shall have power to administer all oaths, certify to all official acts, and to compel attendance of witnesses, and the production of papers, way-bills, books, accounts, documents and testimony, and to punish for contempt as fully as is provided by law for the District or County Court.

"Art. 6656. **Rates to be Held Conclusive until, Etc.**—In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said Commission before the institution of such action, shall be held conclusive and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein, until finally found otherwise in a direct action brought for that purpose in the manner prescribed by Arts. 6657-6658 of this chapter.

"Art. 6657. **When Railway Dissatisfied, May File Petition, Etc.**—If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, or-

der, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court at either of its terms; and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that, if the court be in session at the time such right of action accrues, suit may be filed during such term, and stand ready for trial after ten days' notice.

"Art. 6658. **Burden of Proof.**—In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence, that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable or unjust to it or them.

"Art. 6659. **Railroads to be Furnished with Schedule of Rates Fixed.**—Said Commission shall, as soon as the classifications and schedules of rates herein provided for are prepared by them, furnish each railroad subject to the provisions of this chapter with a complete schedule, in suitable form, showing the classification of freight made by them, and the rates fixed by said Commission to be charged by such road for the transportation of

each class of freight, and shall cause a certified copy of such classification and schedule of rates to be delivered to each of said railroads at its principal office in this State, if it has such office in this State, and, if not, then to any agent of said company in this State; which said schedule, rules and regulations, shall take effect at the date which may be fixed by said Commission, not less than twenty days. Each of said railroad companies shall cause said schedule to be printed in type of a size not less than pica, and shall have the same posted up in a conspicuous place at each of its depots, so as to be inspected by the public. Said Commission may at any time abolish, alter or in any manner amend the said schedule or abolish or amend any such regulation; and in that event, certified copies of the schedules, rules or regulations, showing the changes therein, shall be delivered to each road as herein specified. In all cases where the rates shall not have been fixed by the Commission, no changes shall be made except after ten days' notice to, and consent of, the Commission.

"Are. 6660. **Emergency Freight Rates.**—In addition to the powers conferred on the Railroad Commission of Texas by Arts. 6655 and 6659, said Commission shall have the power, when deemed by it necessary, to prevent interstate rate wars, and injury to the business and interests of the people or railroads of the State, or in case any other emergency to be judged of by roads of the State, or in case of any other emergency to be judged of by the Commission, it shall be its duty to temporarily alter, amend, or suspend any existing freight rates, tariffs, schedules, orders and circulars on any railroad or part of railroad in this State, and to fix freight rates where none exist.

"Art. 6661. **To What Roads Apply.**—Said emergency rates so made by the Commission shall apply on any one or more of all the railroads in this State, or part of railroads that may be directed by the Commission .

"Art. 6662. **Rates Take Effect, When and How Long Continued.**—Said rates so made shall take effect at such time and remain in force for such length of time as may be prescribed by the Commission.

"Art. 6663. **Temporary Freight and Passenger Tariff, Power to Make.**—In addition to all other powers conferred by law upon the Railroad Commission of Texas, said Commission shall have the power to make temporary freight and passenger tariffs to take immediate effect at such time as shall be fixed by said Commission whenever an emergency arises, the sufficiency of which shall be judged of by said Commission, in order that justice may be done or injury prevented any person, place or locality; and said Commission shall have the power at once to suspend temporarily any existing freight or passenger tariff, and to establish freight and passenger tariffs, rules and regulations for temporary use, to have immediate effect where none exist."

Under Art. 6669 of the Revised Statutes of Texas, it is made penal for any carrier to charge a greater rate of transportation that that prescribed by the Railroad Commission. The article is as follows:

"Art. 6669. **Penalty for Extortion.**—If any railroad company subject to this chapter, or its agents, or officer, shall hereafter charge, collect, demand, or receive from any persons, company, firm or corporation a greater rate, charge or com-

pensation than that fixed and established by the Railroad Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than one hundred dollars, nor more than five thousand dollars."

Under Article 6671 of said statutes, a penalty accrues to each individual shipper when the carrier makes a charge in excess of that prescribed by the Railroad Commission. The article is as follows:

Art. 6671. **Damages; Penalty; Venue in Cases of Discrimination.**—In case any railroad subject to this chapter shall do, cause to be done, or permit to be done, any matter, act or thing, in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad shall be liable to the person or persons, firm or corporation, injured thereby for the damages sustained in consequence of such violation; and in case said railroad company shall be guilty of extortion or discrimination as by this chapter defined, then, in addition to such damages, such railroad shall pay to the person, firm or corporation injured thereby a penalty of not less than one hundred and twenty-five dollars, nor more than five hundred dollars, to be recovered in any court of competent jurisdiction in any county into or through which such railroad may run; provided that such road may plead

and prove as a defense to the action for said penalty that such overcharge was unintentionally and innocently made through a mistake of fact, provided that any such recovery as herein provided shall in no manner affect a recovery by the State of a penalty provided for such violation."

Failure to obey the orders of the Railroad Commission is made penal by Article 6672, which is as follows:

"Art. 6672. **Penalty not Otherwise Provided.**—If any railroad company doing business in this State shall hereafter violate any other provision of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not been provided by law, or shall fail, neglect, or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, for such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollars."

ARGUMENT.

I.

The act to regulate commerce and the amendments thereto does not confer upon the Interstate Commerce Commission jurisdiction or authority to regulate or control purely intrastate rates; on the contrary, the Interstate Commerce Commission act expressly eliminates intrastate rates from the jurisdiction of the Interstate

Commerce Commission, and the order complained of in this cause is void for lack of jurisdiction.

The United States Commerce Court, through Knapp, P. J., thus states the case:

> "There is no dispute about the material facts, and they are easily comprehended. The interstate rates of petitioner from Shreveport, Louisiana, to Dallas, Texas, and intermediate points on its line, are very much higher in proportion to distance than the State rates of petitioner from Dallas to the same intermediate points in the State of Texas. For example, the rate on farm wagons from Shreveport to Marshall, a distance of 42 miles, is 56 cents per 100 pounds, while the rate from Dallas to Marshall, a distance of 147 miles, is only 36.8 cents. Under such an adjustment of freight charges, it is obvious that Shreveport is severely, if not fatally, handicapped in its competition with Dallas, for the trade of the intervening territory, most of which is situated in the State of Texas. It appears that operating conditions are substantially the same throughout the entire line, and in both directions between these two cities, and petitioner makes no claim that the disparity in rates can be justified by differences in the cost of transportation. Indeed, it seems to be conceded that the rate situation here in question would clearly constitute undue prejudice to Shreveport, and undue preference to Dallas, within the meaning of the third section of the act [Act Feb. 4, 1887, c. 104, 24 Stat., 380 (U. S. Comp. St. 1901, p. 3155)], provided that section be applicable if the intrastate rates from Dallas, like the interstate rates from Shreveport, were voluntarily established by the carrier. But while the discrimination in fact against Shreveport is admitted, the conten-

tion is made that as a matter of law it is not, and cannot be, undue, or otherwise in violation of the act, because the intrastate rates in question are made by authority of the State of Texas, and the petitioner is under legal compulsion to observe them. In other words, it is insisted that a violation of the third section cannot be predicated upon a rate relation, however unjust, which is brought about not by the voluntary action of the carrier, but by the command of the State, which thec arrier is constrained to obey.

"In this suit the order of the Commission is sought to be set aside only so far as it affects commodity rates, and the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the service rendered; that is, rates which conform to the requirements of the first section of the act, and which, therefore, petitioner may justly and lawfully charge. From this finding, in connection with other facts stated, it seems necessarily to follow that the intrastate commodity rates of petitioner from Dallas to the same destinations, which the Texas Commission has prescribed, are materially less than petitioner is justly entitled to charge; and this involves the further consequence that the Texas Commission, by imposing upon petitioner lower rates than it should rightfully receive, has, in point of fact, placed an undue burden upon interstate commerce, and thereby obstructed the freedom of its movement. If this is a correct analysis of the situation, as is virtually admitted, it can hardly be doubted that the action which produces such a result, whether intended or otherwise, is in derogation of the power and authority of Congress under the Commerce Clause of the Constitution."

This clearly sets forth the attitude of the Court and the majority of the Commission.

Since the appeal in this case was perfected, the case of **Simpson v. Shepherd, 33 Sup. Ct. Rep., 729,** and **Knott v. C. B. & Q., 33 Sup. Ct. Rep., 975,** known as the "Minnesota Rate Cases," have been submitted and decided by this Court, and we submit that the decision of this Court in these cases is decisive of the questions involved in the case at bar, and render unnecessary the further citation of authorities.

In the Minnesota case the facts are directly applicable. There, there were numerous cities situated directly on or adjacent to the State line. Interstate rates had long been established from the points across the State line into Minnesota. The Minnesota rate being lower than this interstate rate, it was claimed by the carrier, and found as a fact by the trial Court, that these State rates constituted a direct discrimination against the outside point, and compelled a reduction of the interstate rate, or else excluded the competitive point over the State line from competition.

In the case at bar the Interstate Commission does not find that the commodity rates here involved, from Shreveport to the competitive Texas territory, are unreasonable. To the contrary, it treats them as reasonable rates. The Commerce Court says:

> "In this suit the order of the Commission is sought to be set aside only so far as it affects commodity rates, and the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the service rendered; that

> is, a rate which conforms to the first section of the act, and which, therefore, petitioner may justly and legally charge."

There is no finding that the Texas rates from Dallas and Houston towards Shreveport are **per se** unreasonably low. The order of the Commission, and its finding of an unlawful discrimination is based solely upon the proposition that, being lower than the interstate rates from Shreveport, the Texas jobber in Houston and Galveston, has, by reason of these lower and purely intrastate rates, an advantage in competitive territory. The order is that the rates be equalized, and the Commerce Court holds that the carrier is at liberty to increase the rate prescribed by the Railroad Commission of Texas, notwithstanding the Texas statutes punish such action by the severest penalties, accruing both to the State and to the individual shipper, upon each shipment. The Court says:

> "The Commission also found by necessary inference, as its order clearly indicates, that the interstate commodity rates in question were not unreasonable, thus, in effect sanctioning the continuance of those rates. It is likewise a necessary inference from the report and order that, the unlawful discrimination against Shreveport, so far as commodity rates are concerned, was caused by the imposition of intrastate rates, which are lower than petitioner is justly entitled to charge. This being so, it follows that petitioner is at liberty, and has the right, to comply with the Commission's order by making a proper increase of its Texas rates. Indeed, since its interstate rates are not excessive, such an increase appears to be the

only method of compliance which would be just, both to the shipper and the carrier. When this order was made upon the facts so ascertained and reported, it had the effect, in our judgment, of relieving petitioner from further obligation to observe the intrastate rates which the Texas authorities had prescribed. The petitioner was no longer under the compulsion in respect to those rates, because the rate situation disclosed by the inquiry was subject in its entirety to the provisions of the Federal statute and the administrative control of the Commission. The order of the Commission, therefore operated to release petitioner as regards the intrastate rates in question from the restraint imposed by the State of Texas, and thereupon, petitioner became entitled, if it did not choose to reduce its interstate rates, to comply with the order by advancing its Texas rates sufficient to remove the forbidden discrimination. Its obedience was due to the superior authority, and it ceased to be bound by any inconsistent obligation."

While much is said in the majority opinion of the Interstate Commerce Commission as to the "protective policy" of the Railroad Commission of Texas, it sufficiently appears that the Texas rates complained of are the ordinary mileage rates which apply between all points in Texas. These rates are presumably reasonable, and by statute they are made conclusively so in all litigation between private parties until set aside by direct action brought for that purpose.

It is probable that both the Commerce Court and the majority of the Commerce Commission were unduly influenced by the decision of Judge Sanborn in the Minnesota case, 184 Fed. Rep., 765.

Section 1 of the act to regulate commerce limits the jurisdiction of the Interstate Commerce Commission, both affirmatively and negatively. After first stating that the provisions of the act apply to transportation from one State or Territory or the District of Columbia, to another State or Territory of the United States, or the District of Columbia, etc., it would seem to have been sufficiently specific to exclude from the jurisdiction of the Commission purely intrastate commerce. In order that there could be no possible question as to such jurisdiction, the following provision was added:

> "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering storage or handling of property wholly within one State, and not shipped to, or from, a foreign country, from or to any State or Territory as aforesaid."

The limitations of the first section are further made more specific by making the act applicable to transportation of property shipped from **any place in the United States** to a foreign country, and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry, either in the United States or an adjacent foreign country. The contention made by the majority of the Commission that section 3 of the act broadened its powers, is also disposed of by the decisions of this Court in the cases referred to, and it is clearly made apparent by the dissenting opinions of Commissioners Clements, Harlan and McCord that all of

the powers conferred in the act must be exercised under the limitations prescribed by Section 1.

In order to reach the results obtained in this finding, the Interstate Commission was under the necessity of overruling its own opinions in the following cases. **In the Matter of Freight Rates between Memphis and Points in Arkansas, 11 I. C. C., 180; Saunders v. Southern Express Company, 18 I. C. C., 415; Andy's Ridge Coal Company v. Southern R'y. Co., 18 I. C. C., 405; New Jersey Fruit Exchange v. C. R. R. of N. J.' 21 C. R., 84.**

In the first of these cases this exact issue was sharply raised. Complaint was made that local Arkansas rates to Little Rock and Pine Bluff operated as a a discrimination against Memphis, and without dissent, the Commission, speaking through Chairman Knapp, said:

> "So far as the discrimination of which Memphis complains was caused by the action of the Arkansas Commission, without the consent and against the protest of defendant, it is certainly doubtful in the present state of law whether the defendant can be held responisble. If it is voluntary adjustment of rates between these itcies was fair and equitable, and that adjustment has been changed and rendered unfair to one of them by action which the defendant could not prevent or control, it is difficult to see on what theory it can be held at fault for the resulting discrimination, provided its Memphis rates **per se** are just and reasonable. In a word, we are constrained to reject the complainant's contention so far as the charge of discrimination against Memphis rests wholly upon comparison with the lower rates imposed by the Arkansas Commission."

In the case of **Saunders v. Southern Express Company, 18 I. C. C., 415,** the rates imposed by the Railroad Commission of Alabama severely discriminates against the interstate rates from Pensacola to competitive points. The Commission held, speaking through Commissioner Harlan, that it had no jurisdiction in the premises. It was said:

> "Moreover, as the defendant's rates are held down under the compulsion of the order by the State Commission, an order by this Commission requiring it to cease and desist from a resulting discrimination against Pensacola would be equivalent to an order requiring defendant to reduce its Pensacola rate to a level with the State rates out of Mobile. Such an order we are not prepared to enter, at least at this time, and as now advised. This view of the record will leave the Pensacola fish dealers without present redress before this Commission so far as the discrimination complained of is concerned, but the situation is one that we find it difficult to remedy under existing legislation. While we have full authority upon certain principles and within certain limits distinctively fixed in the amended act to deal with interstate rates, it is expressly provided in Section 1 that 'the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country, from or to any State or Territory as aforesaid.' This language seems to have but one meaning, and that is that, although the Commission may give, and has in fact given to the National Commission authority to control and regulate the rates to be de-

manded and accepted by the interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely State traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order, the purpose of which is to directly or indidirectly to affect the rates imposed upon the defendant by the order of the Alabama Commission."

In the case of **Andy's Ridge Coal Company v. Southern Railway Company et al., 18 I. C. C., 405**, one of the rates complained of was wholly an intrastate rate This intrastate rate, the Commission, speaking through Commissioner Prouty, was held to be discriminative against the interstate rate, but without dissent it was again held that the Commission had no power to correct the discrimination. It was said:

> "While, however, it has seemed proper to note the discrimination which we find to exist, the Commission is of the opinion that it has no jurisdiction to require by its order a discontinuance of that discrimination, inasmuch as the rate used by the complainant is a State rate, the movement from Coal Creek to Nashville being entirely within the State of Tennessee."

Mr. Prouty, in the present opinion, states that this case should be overruled, and it is, of course, very effectually overruled by the majority opinion. Nevertheless, Mr. Prouty himself, in the case of **Southwestern Shippers'**

Traffic Association v. A. T. & S. F. R'y. Co. et al., 24 I. C. C., 570, decided June 6th, 1912, clearly held that the Commission, without further power conferred by Congress, could not remedy a discriminative situation growing out of State rates from Galveston to interior Texas points. Certain Oklahoma shippers complained of these Texas rates as discriminative against Oklahoma points. But it was held that the Commission was powerless to remedy the situation. He said:

> "The hardship which the present adjustment of rates imposed upon central Oklahoma points has been strongly urged upon the attention of the Commission in this proceeding. The Texas Commission establishes rates upon a mileage basis up to a certain distance, beyond which the rate applies as a blanket to all Texas common points. Thus, the first class rate from Galveston for a distance of approximately 300 miles is 87 cents, and this same rate applies to the northern border of Texas, a distance of 450 miles. This gives the distributing cities in the north of Texas, which wholesale in competition with Oklahoma points, a distinctly lower rate from the Atlantic seaboard than Oklahoma enjoys, and undoubtedly results in a decided advantage to Texas jobbing centers in case of articles purchased upon the Atlantic seaboard, but this discrimination is one which this Commission is powerless to remedy. The Texas rates are a matter of domestic concern, over which we exercise no control. The so-called discrimination results not from the Texas rates, but from the fact that under the decision of the Supreme Court of the United States, the jobber, by taking possession of his traffic at Galveston, can obtain the

benefit of the water rate to Galveston, and the rail rate from Galveston, although the shipment is in point of fact an interstate movement. If the results which flow from this holding are not satisfactory, Congress may easily provide that a movement which is interstate in fact shall not be converted into two local movements by an intervening possession. In that case this Commission could establish a reasonable rate to Texas points which must be applied to all shipments from the Atlantic seaboard to those points, and a discrimination resulting from arbitrary conditions like that before us would be rendered impossible. To-day this Commission, while it recognizes the existence of the discrimination, cannot pronounce it unlawful."

It will be noted that this case is a much stronger one in favor of the jurisdiction of the Interstate Commission than the case at bar. In fact, Mr. Prouty holds that the movement under the Texas rates from Galveston is really interstate commerce, the transit of which is broken at Galveston. Nevertheless, he holds that by taking possession of his goods at Galveston, the transit is broken, and the rate from Galveston to the border line of Texas, while it results in a discrimination against those shippers across the border, is nevertheless wholly beyond the jurisdiction of the Commission until enlarged by Congressional action.

A similar question was before the Commission in the case of **P. P. Williams Co. v. Vicksburg, Shreveport & Pacific R'y Co. et al., 16 I. C. C., 482.**

The Vicksburg, Shreveport & Pacific Railway runs due west from Vicksburg, through Louisiana, to Shreveport,

where connection is made on a practically continuous line with the T. & P. Railway and other roads, to northern Texas points. Vicksburg is as near to, and in some cases much nearer, competitive points in northern Texas than Galveston. Nevertheless, the interstate rates from Vicksburg to these points were largely in excess of the Texas intrastate rates from Galveston to the same points, the articles especially involved being bagging and ties and wire and nails. For instance, from Galveston to Dallas is 321 miles, and from Vicksburg to the same point is 359 miles. Yet the interstate rate on bagging and ties from Vicksburg is 32 cents per hundred pounds, while from Galveston the State rate is 21 cents, and on wire and nails the interstate rate from icksburg is 50 cents while the Galveston intrastate rate is 25 cents. To other points, such as Paris, Clarksville, Sulphur Springs, Longview, Mineola, Big Sandy, and Terrell, the mileage from Galveston is in excess of that from Vicksburg. The disparity in the rates is, therefore, apparent, and Vicksburg complained of the discrimination, but the Commission said:

> "It is not necessary to consider the rates and mileage from Galveston to the points in northeastern Texas named by the complainant. Those rates are intrastate rates and via other lines than those leading from Vicksburg, so that there can be no valid comparison between them."

Other cases might be quoted, but these are sufficient to show that continuously the Interstate Commerce Commission has disclaimed the jurisdiction here sought to be exercised, and its decision herein marks a radical departure from the views and practices obtaining since its

creation. It can confidently be said that prior to the opinion of Judge Sanborn in the Minnesota case, no decision of any Court, State or Federal, or of any governmental administrative body had held that a State made rate applicable solely to intrastate commerce was an interference with interstate commerce, or subject to Federal jurisdiction, because it might have an incidental or consequential effect upon interstate movements or traffic.

The facts in the case of **Alabama & Vicksburg R'y Co. v. Mississippi Railroad Commission, 203 U. S., 496,** are much more proximate in their relation to interstate commerce than those in the case at bar. There, grain from the northwest was shipped to and concentrated at Vicksburg, and on such grain a re-billing rate of 3½ cents per hundred pounds was made on this traffic shipped from Vicksburg to Meridian, Miss., applicable, however, only in cases of shipments over the Vicksburg, Shreveport & Pacific. The Mississippi Commission thereupon made an order to the effect that all grain products shipped from Vicksburg to Mississippi should bear the same rate. This order was attacked as a direct interference with interstate commerce, but this Court, speaking through Mr. Justice Brewer, held that the Railroad Commission of Mississippi was within its legal rights.

See also:

Ames v. U. P. R. R. Co., 64 Fed. Rep., 177.

S. P. Co. v. R. R. Commission, 193 Fed Rep, 699.

L. & L. v. Siler et al., 186 Fed. Rep., 176.

Oregon R'y & Nav. Co. v. Campbell, 173 Fed. Rep., 957.

Woodside v. Tonapah & G. R. Co., 184 Fed., 360.

St. L. & S. F. R'y Co. v. Hadley, 168 Fed., 341.

G. C. & S. F. R'y v. State, 204 U. S., 403.

II.

"The Texas interstate rates complained of are not voluntary rates applied by the carriers, but are rates prescribed by the duly constitued authorities of the State of Texas, obedience to which is compelled by the Texas law, and such obedience cannot constitute an illegal discrimination under the act to regulate commerce."

The Texas intrastate rates which are held to be discriminatory were promulgated by the Railroad Commission of Texas. If the carriers should, under the Texas statutes, undertake to install higher rates, they are subject to a penalty as for extortion of not more than $5,000 on each shipment, by a suit of the State of Texas, and a penalty of not less than $125.00 nor more than $500.00 on each shipment accruing to the individual shipper. A further penalty accrues of not more than $5,000.00 for failing to observe the orders of the Railroad Commission. These Texas rates are observed under the severe compulsion of these penalties, and are in no sense voluntary rates. Under the decision of this Court in the case of **East Tenn., Va. & Ga. R'y. Co. v. I. C. C., 181 U. S., 1,**

section 3 of the act to regulate commerce does not apply. This Court, speaking through Chief Justice White, there said:

> "The prohibition of Section 3 when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts, the results of conditions wholly beyond the control of the carriers."

To the same effect is the decision of the Interstate Commerce Commission **In the Matter of Freight Rates Between Memphis and Points in Arkansas, 11 I. C. C., 180.**

III.

> "The Congress of the United States has no power under the Constitution of the United States to regulate or control purely intrastate commerce and rates; if Congress does possess such power it has never exercised same and never vested the exercise of such right in the Interstate Commerce Commission; on the contrary, it has expressly declined to invest such authority in the Interstate Commerce Commission, and has expressly taken from the Interstate Commission any right or jurisdiction over purely intrastate rates."

The whole course of decision in all of the great rate cases where the validity of State legislation and the

action of State authority has been questioned, either as in conflict with the due process, or the commerce clause, of the Federal Constitution, presents no suggestion or intimation that Congress possesses the power to regulate purely domestic commerce. This historic fact, of course, weighs heavily as a rule of construction negativing the contention that in the act to regulate commerce it was intended to clothe the Interstate Commerce Commission with an authority never asserted or claimed by Congress itself. It is equally potent as an argument against the every existence of the power. Beginning with **Munn v. Illinois, 94 U. S, 113,** and proceeding step by step through **Stone v. Farmers Loan & Trust Company, 116 U. S., 307; C. M. & St. P. R'y Co. v. Minnesota, 134 U. S., 418; Dow v. Beidelman, 125 U. S., 680; Chicago & Grank Trunk R'y. v. Wellman, 143 U. S., 349; Reagan v. Farmers Loan & Trust Company, 154 U. S., 362; St. L. & S. F. R'y v. Gill, 156 U. S., 649;** and **Smythe v. Ames, 169 U. S., 466,** each and every case proceeds upon the theory and assumption that the right to control purely intrastate and domestic commerce is a high sovereign power of the individual State, and that within this domain the jurisdiction of the State is as complete and exclusive as is that of the Federal government in the regulation of commerce among the States. Equally strong is the proposition in all the great tax cities, and in those where the action of the State, attacked as an interference with interstate commerce, finds its basis in the police power of the State, is the assertion of the proposion that in order to constitute an interference with, or burden upon, interstate commerce, the effect of the State's action must be proximate and direct, and that a mere inci-

dental or consequential effect upon interstate commerce does not constitute an invasion of the Federal domain. Time and again, this Court has stated the principle that railroad building and rate making are, in reality, functions of the State itself, delegated by legislative authority to private carriers, and that the regulation of rates is a high sovereign power of the State, and where the exercise of this high power is confined to commerce wholly within the State it does not fall within the terms of the Commerce clause of the Constitution. This thought is aptly expressed in the dissenting opinion in **Wabash R'y Co. v. Illinois, 118 U. S., 557:**

> "It is only for the sake of convenience that the State lets out its railroads to private corporations. It might construct them itself. Suppose it had done so in this case, could not the State have instituted such rate of freight and fare as it pleased? Certainly it could. It might have made them uniform, as the present law requires them to be, but it might have made them discriminate between different places, and no one could have called it to account. Instructions in the form of laws or in the form of orders made by the State body might have been given to the superintendent of the road, acting in behalf of the State, to adopt the one course or the other. Could the agents of the State, acting under such instructions, have been interfered with by the judicial department on the ground of unconstitutionality? Certainly not, unless discriminations were made to the prejudice of citizens of other States or the produce of other States. The State of New York built and owns the Erie Canal. Did any court ever attempt to control that State in its regulation of tolls on the

canal, even though made for the purpose of affecting the rail movement of goods on the canal and railroads of the State? We presume that no such attempt was ever made or would ever be successfully made."

Sands v. Manistee River & Improvement Co., 123 U. S., 288, involved a law of the State of Michigan permitting improvements of rivers and the charging of tolls for the use thereof upon schedules of charges submitted to or approved by a State board of control. Suit was brought for such tolls, and the statute attacked as a regulation of interstate commerce. This Court, by Justice Fields, said (295):

> "The Manistee River is wholly within the limits of the State of Michigan. The State can, therefore, authorize any improvement which in its judgment will enhance its value as a means of transportation from one point of the State to another. **The internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government.**"

In **Hopkins v. United States, 177 U. S., 578,** the regulations of the Kansas City Livestock Exchange were attacked as in violation of the Sherman Anti-Trust Act. It was held that the effect of these regulations upon interstate commerce was too remote and indirect to come within the Federal jurisdiction. Justice Peckham, delivering the opinion of the Court, says (597):

> "But in all the cases which have come to this Court, there is not one which has denied the dis-

tinction between a regulation which directly affects and embraces interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transactions of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of the charge for the use of the facility."

In **United States v. Knight, 156 U. S., 1,** which was a proceeding under the Federal anti-trust act, this Court, in holding that manufacture is not commerce, and speaking through Chief Justice Fuller, page 13, said:

> " It is vital that the independence of the commerce power and of the police power and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the State as required by their dual form of government, and acknowledged evils, however, grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality."

In the case of **Austin v. Tennessee, 179 U. S., 343,** this Court, in sustaining the cigarette act of the State of Tennessee, said (349):

> "We have had repeated occassion to hold, where State legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that if the action of the State Legislature were a **bona fide** exercise of its police

> power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected though it might interfere indirectly with interstate commerce."

In **Texas & Pacific Railway v. I. C. C., 162 U. S., 197,** in discussing the first section of the act to regulate commerce, the Court, while asserting the full jurisdiction of Congress, was careful to exclude from that jurisdiction commerce wholly within a State. A page 212 it said:

> "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce **(excepting commerce wholly within a State)**, as well that between the States and Territories as that going to or coming from foreign countries."

As shown in the cases above cited, the Interstate Commerce Commission has, prior to the rendition of the order herein involved, been forceful in its repudiation of any authority to act upon commerce between points wholly within a given State, whatever might be the indirect effect upon interstate commerce. This is well illustrated in **New Jersey Fruit Exchange v. Central Railroad Company of New Jersey, 2 I. C. R., 84.** Complaint was made by peach shippers of New Jersey of rates on peaches moving from New Jersey points to New York. It apears that the peach shipment formerly moving directly from New Jersey points of origin to the city of New York were at the time of the complaint delivered to consignees at Jersey City, and they were thereafter, by separate shipping arrangements, transported to New York. Here was a great and continuous stream of com-

merce moving, it is true, wholly between points in the State of New Jersey, but ultimately to an interstate point. Yet the Commission clearly disclaimed jurisdiction. That the rate from the interior point in New Jersey to Jersey City must indirectly affect the rate to New York could not, of course, be questioned. Nevertheless, the Commission held that it had no jurisdiction in the premises. This and subsequent decisions of the Interstate Commerce Commission are in line with that of this Court in **Gulf, Colorado & Santa Fe Railway Company v. State of Texas, 204 U. S., 403.**

The Federal or State jurisdiction must, in the last analysis, rest upon a proposition of fact, to-wit: Is the commerce regulated interstate commerce, or is it intrastate commerce? In the case at bar there is no contention that the commerce moving from Houston or from Dallas towards the Louisiana line is otherwise than purely State commerce. There is no contention that the rates prescribed by the Railroad Commission of Texas are different from the rates prescribed for all other citizens of the State for the same distance and upon the same commodity. And, it is submitted that the mere fact that these rates operate incidentally to give the citizen of Texas distributing his goods to Texas points an incidental advantage over the citizen of Louisiana who wishes to compete in the same territory, cannot in any just or constitutional sense be an interference with interstate commerce. There is no discrimination against the citizen of Louisiana as such. There is no interference with interstate commerce as such. A just and general rule is prescribed by the rate-making authority of the State applicable to all its citizens, and finding its justi-

fication in the local and domestic conditions surrounding the traffic. If these rates enable the citizen of Texas to distribute his products to points within the State at a less rate per mile than can the citizen of another State who wishes to ship in the same territory, the disadvantage of the latter does not constitute such an interference with interstate commerce as justifies Congressional action under the commerce clause, but is a mere incident to our dual system of government.

The **Employers' Liability Cases, 207 U. S., 463**, clearly define the rule here sought to be invoked. There the lack of Federal jurisdiction was based upon a simple issue of fact. While the right to regulate and contral instrumentalities of interstate commerce was clearly sustained, the absence of Federal power to regulate the liabiliity of the carrier to a servant or agent not engaged in interstate commerce was as clearly asserted, and because the act was general in its terms, and applicable to those engaged in both interstate and intrastate commerce, it was held invalid. It is said:

> "From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trading or commerce between States, and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form the statute is addressed to individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do. That is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce. * * * The act, then, be-

ing addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside the power of Congress to regulate commerce."

In reaching the conclusion that the act was unconstitutional, the Court quotes the following passage from **Gibbon v. Ogden, 9 Wheat., 196,** which is peculiarly applicable here:

> "It is not contended that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to, or affect, other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce **which concerns more States than one.** * * * The genius and character of the whole government seems to be that its action is to be applied to all the internal concerns of the nation and to those internal concerns which affect the State generally but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

If the assertion of the Federal power contended for by the majority of the Interstate Commerce Commission, and upheld by the Commerce Court in the decree ap-

pealed from, is here sustained, and the principle is established that every State rate which incidentally affects interstate traffic may be withdrawn from the jurisdiction of the State by Congressional action, then as a practical matter, the control of the State over its internal commerce has been lost. As illustrated by one of the cases above referred to, every State rate from Galveston to the interior of Texas has an incidental, but nevertheless very appreciable effect upon the interstate rates into Texas from St. Louis and other distributing points. A vast commerce moves from the eastern, middle and Atlantic States through the port of New York, directly to Galveston, and thence is distributed over the vast doman of Texas. Much of this commerce moves on a port to port ship's bill of lading to Galveston. Some of it moves on a through bill of lading by rail to New York, and water to Galveston. From Galveston, under the rates prescribed by the Railroad Commission of Texas, it moves to interior points in that State. In order to compete with these eastern shippers, carriers from St. Louis, Chicago, and other western points of distribution, must, by the through interstate rates from those points to Texas, meet the rates made by the combination of the water rate to Galveston and the local Texas rate to the competitive Texas territory. The local Texas rate prescribed by the Railroad Commission of Texas, therefore, has an appreciable effect on the interstate rate, for example, from St. Louis, Kansas City and Chicago. Again, goods are shipped from eastern territory by water from Atlantic seaports, on through rates, and through bills of lading, to Texas points. By taking possession of his goods at Galveston, and shipping to the interior Texas

points on the local Texas Railroad Commission rate, the Galveston distributor may be able to obtain a less total charge to the final point of destination than the shipper who uses the through rate and the through bill of lading from the initial point. The purely internal or domestic rate, therefore, in any State with ports of importance, must always have an appreciable influence upon the interstate rate. And, if for that reason Congress has power to regulate these purely internal rates, then the State authorities are shorn of those powers which alone can justify their existence. The illustration of movements to and from ports is far more favorable to the existence of the Federal jurisdiction than are the facts of the case at bar. Because in these cases it might be contended with much force that the movement being practically continuous, a mere incidental interruption for the purpose of taking possession of the article moved, does not deprive the commerce of its essential nature. In the case at bar no such facts exist. The commodity moved from Houston and Dallas, in the direction of Shreveport, on the local Texas rates, is not moved in the stream of interstate commerce. It is a part of the general mass of propery in the State. At no point in the transit does the character of interstate commerce attach to it, and while conceding to the utmost the plenary jurisdiction of Congress as to all matters of interstate commerce, it is submitted that as to such a movement the facts do not, and cannot, exist to which that jurisdiction can attach. In view of the legislative and judicial history of this subject matter, it is not hazarding too much to say that, had it been conceived that the contention would be advanced that Congress had the power, or that it intended in the

act to regulate commerce to confer upon an administrative agency of the government the right to nullify the acts of State authorities applicable to movements confessedly purely intrastate because of their incidental effect upon commerce, interstate in its character, that the act would never have become a law, and the Interstate Commerce Commission never created.

It is believed, however, that this last and most serious question need not be reached in the determination of this case, for the reason that the language of the act itself, as construed by this Court, does not confer upon the Interstate Commerce Commission the authority here sought to be exercised. And that, even conceding the jurisdiction of the Commission, the involuntary obedience of the carriers to intrastate rates made by the Texas Railroad Commission cannot constitute an undue or illegal discrimination as against an interstate rate found to be reasonable by the Interstate Commerce Commission.

Respectfully submitted with the prayer that the decree of the United States Commerce Court dismissing appellants' bill be reversed, and that that Court be directed to enter its decree enjoining the enforcement of the order of the Interstate Commerce Commission in so far as it affects the commodity rates from Shreveport to Texas points and the same rates as apply from Dallas and other points on its line towards Shreveport, for equal distances.

GEORGE THOMPSON,
W. L. HALL,
Attorneys for Appellants.

THOMAS J. FREEMAN,
Of Counsel.

EXHIBIT A.

205 Federal Reporter, 380.

TEXAS AND PACIFIC RAILWAY COMPANY

versus

UNITED STATES (INTERSTATE COMMERCE COMMISSION, ET AL., INTERVENORS).

(Commerce Court, April 25, 1913.)

No. 68.

1. **Commerce (Sec. 85*)—Interstate Commerce Commission—Powers—Discrimination Between Localities.**

The proviso in Interstate Commerce Act Feb. 4, 1887, c. 104, Sec. 1, 24 Stat. 379 (U S. Comp. St. 1901, p. 3154), that the act shall not apply to transportation wholly within one State, is a mere disclaimer of any intention on the part of Congress to exceed its constitutional power, and was designed to limit the provisions that are within the power which Congress could exercise, and the proviso does not prevent the application of the third section in prohibiting undue discrimination between localities to cases where such discrimination is brought about by State action, requiring a reduction in intrastate rates.

[Ed. Note.—For other cases, see Commerce, Cent. Dig., Sec. 138; Dec. Dig., Sec. 85*]

2. **Commerce (Sec. 85*)—Interstate Commerce Commission—Powers—Discrimination Between Localities.**

Though the preference given to one locality or the disadvantage to which the other is subjected is not due to the voluntary act of the carrier, and although the interstate rates in force may be reasonable in themselves, the Interstate Commerce Commission can correct the discrimination by requiring a just equalization in rates between the two localties.

[Ed. Note.—For other cases, see Commerce, Cent. Dig., Sec. 138; Dec. Dig., Sec. 85.*]

*For other cases see same topic and Sec. Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

3. **Commerce (Sec. 8*)—State Regulation of Rates—Validity—Interference with Interstate Commerce.**

The right of a State to control the movement of its internal commerce, and the instrumentalities employed in such movement, is not unlimited, and the action of a State in reducing railroad rates on intrastate shipments below what is justly compensatory to the carriers, with the purpose and effect of securing unjust and arbitrary advantage to dealers within the State over competitors in other States, directly affects interstate commerce, and encroaches on the field in which Federal authority is supreme and exclusive, and the rates so made cannot be held binding upon the carriers affected.

[Ed. Note.—For other cases, see Commerce, Cent. Dig., Sec. 5; Dec. Dig., Sec. 8.]

4. **Power of Interstate Commerce Commission over Involuntary Rates.**

While Congress may constitutionally confer upon the Interstate Commerce Commission the power to prevent an undue prejudice between communities, resulting from varying interstate and intrastate rates, even though one or the other be not

voluntarily established, such power has not yet been granted. Such an order cannot be based upon a compelled rate, whether interstate or intrastate, and whether compelled by competition, by statute, by court decree or by order of a Commission. (Per. Mack, J.)

Voluntary Acquiescence in Compelled Rates.

The present order can be upheld only upon the theory that the failure of the railroads to attack the Texas Commission rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be decreed to have been voluntarily made by the railroads. (Per. Mack, J.)

Petition by the Texas & Pacific Railway Company against the United States of America, in which the Interstate Commerce Commission, the Railroad Commission of Louisiana, the St. Louis Southwestern Railway Company and others, intervene. On final hearing. Petition dismissed.

For opinion of Interstate Commerce Commission, see **Meredith v. St. Louis Southwestern R'y Co., 23 Interst. Com. Comm. R. 31.**

Henry G. Herbel of St. Louis, Mo. (Fred G. Wright, of St. Louis, Mo., on the brief) for petitioner.

Winfred T. Denison, Asst. Atty. Gen. (Thurlow M. Gordon, Sp. Asst. Atty. Gen., on the brief) for the United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Luther M. Walter, of Chicago, Ill. (R. G. Pleasant, Atty. Gen., and W. M. Barrow, Asst. Atty. Gen., on the brief) for Railroad Commission of Louisiana.

Before **Knapp**, Presiding Judge, and **Hunt, Carland** and **Mack, Judges.**

Knapp, Presiding Judge. The question to be decided in this case has been so thoroughly discussed by the Commission, and kindred questions have been so fully considered in various cases recently decided or now pending in other Courts, that little can be profitably said beyond a statement of our conclusions.

There is no dispute about the material facts, and they are easily comprehended. The interstate rates of petitioner from Shreveport, La., to Dallas, Tex., and intermediate points on its line, are very much higher in proportion to distance than the State rates of petitioner vening territory, most of which is situated in the State of Texas. For example, the rate on farm wagons from Shreveport to Marshall, a distanct of 42 miles, is 56 cents per 100 pounds, while the rate from Dallas to Marshall, a distance of 147 miles, is only 36.8 cents. Under such an adjustment of freight charges it is obvious that Shreveport is severely, if not fatally, handicapped in its competition with Dallas for the trade of the intervening territory, most of which i ssituated in the State of Texas. It appears that operating conditions are substantially the same throughout the entire line and in both directions between these two cities, and petitioner makes no claim that the disparity in rates can be justified by differences in the cost of transportation. Indeed, it seems to be conceded—and certainly no other inference is permissible—that the rate situation here in question would clearly constitute undue prejudice to Shreveport and undue preference to Dallas, within the meaning of the third section of the act (Act Feb. 4, 1887, c. 104, 24

Stat. 380 [U. S. Comp. St. 1901, p. 3155]) provided that section be applicable, if the intrastate rates from Dallas, like the interstate rates from Shreveport, were voluntarily established by the carrier. But while the discrimination in fact against Shreveport is admitted, the contention is made that as matter of law it is not and cannot be undue or otherwise in violation of the act, because the intrastate rates in question are made by authority of the State of Texas, and the petitioner is under legal compulsion to observe them. In other words, it is insisted that a violation of the third section cannot be predicated upon a rate relation, however unjust, which is brought about, not by the voluntary action of the carrier, but by the command of a State which the carrier is constrained to obey.

In this suit the order of the Commission is sought to be set aside only so far as it affects commodity rates, and the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the services rendered; that is, rates which conform to the requirements of the first section of the act, and which, therefore, petitioner may justly and lawfully charge. From this finding, in connection with other facts stated, it seems necessarily to follow that the intrastate commodity rates of petitioner from Dallas to the same destinations, which the Texas Commission has prescribed, are materially less than petitioner is justly entitled to charge; and this involves the further consequence that the Texas Commission, by imposing upon petitioner lower rates than it should rightfully receive, has, in point of fact, placed an undue burden upon interstate commerce, and thereby ob-

structed the freedom of its movement. If this is a correct analysis of the situation, as is virtually admitted, it can hardly be doubted that the action which produces such result, whether intended or otherwise, is in derogation of the power and authority of Congress under the commerce clause of the Constitution.

The right of a State to control the movement of its internal commerce and the instrumentalities employed in such movement is not unlimited, as the Supreme Court has repeatedly declared. In the first case which involved the scope and meaning of the commerce clause, **Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23**, the line of demarkation between State and Federal power was defined by Chief Justice Marshall in the following language:

> "It is not intended to say that these words [commerce among the States] comprehend that commerce which is completely internal, which is carried on between man and man in a State or between different parts of the same State, and which does not extend to **or affect** other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to **that commerce which concerns more States than one.** * * * The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nations, **and to those internal concerns which affect the States generally**, but not to those which are completely within a particular State, **which do not affect other States**, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. (Black-letters ours.)

This definition has been uniformly accepted and the language, itself, quoted with approval in a number of cases. **The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999; The Lottery Cases, 188 U. S. 321, 346, 23 Sup. Ct. 321, 47 L. Ed. 492; The First Employers' Liability Cases, 207 U. S. 463, 493, 28 Sup. Ct. 141 52 L. Ed., 297.** And quite recently, in **The Second Employers' Liability Cases, 223 U. S. 1, 54, 32 Sup. Ct. 169, 177 (56 L. Ed. 327, 38 L. R. A. [N .S.] 44)**, Mr. Justice Van Devanter, after quoting to the same effect from **McCulloch v. Maryland, 4 Wheat. 426, 4 L. Ed., 579**, remarks that "particularly apposite is the reptition of that principle in **Smith v. Alabama,**" **124 U. S. 465, 473, 8 Sup. Ct. 564, 566 (31 L. Ed 508)** where it is stated as follows:

> "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers, which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of oCngress over the subject of commerce, must give way before the supremacy of the national authority."

In the light of these decisions, and many others of similar import, it seems clear to us that Congress is invested with ample power to prevent or remove such a discrimination as is here considered. This is not seriously disputed by petitioner, as we understand the position of counsel; but the contention is pressed that Con-

gress has not exerted its power, even if the power be possessed, to the extent necessary to reach this particular kind of discrimination, and therefore the Commission's order should be set aside because in excess of its authority.

The power which Congress has exercised in this regard finds expression in the third section of the act to regulate commerce, as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect, whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect, whatsoever."

It would be difficult to frame a more comprehensive and unqualified declaration. It applies to all interstate railroads and makes unlawful every act which operates to the undue prejudice of any locality. Taken by itself, and giving to the language used its natural significance, the paragraph quoted brings within its condemnation the rate adjustment here involved, because that adjustment, as a matter of fact, is obviously prejudicial to the shipping interests of Shreveport. And it would follow from this view of the section that the Commission had authority to correct the ascertained injustice by making the order sought to be enjoined. The opposing view is based upon two general grounds which present the real controversy in this case, and which will now be briefly examined.

[1, 2] In the first place, it is said that the provisions of the third section, above quoted, are to be read in connection with the proviso in the first section, and that this proviso defines and limits the power which Congress intended to exercise by expressly excluding transportation "wholly within one State." In other words, the proviso is claimed to be an exception which exempt from regulation under the act the rates on intrastate traffic, and therefore deprives the Commission of authority to found a violation of the statute upon the relation between State and interstate rates, no matter what may be the effect of that relation upon the movement of interstate traffic. The proviso reads as follows:

> "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storing or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

The intent and meaning of this proviso has been quite fully discussed by this Court in **Denver & R. G. R. Co. v. Interstate Com. Com'n, 195 Fed., 968**, and a conclusion therein reached substantially adverse to the contention here considered. In that case we said:

> "Section 1 not only subjects to the act, first, certain carriers, but also, second, certain transportation. The proviso relates, not to the carriers but to the transportation, and is therefore to be read in connection with the second clause of the section, and not with the first. * * *
>
> "Then, out of abundant caution, as it seems, and by way of disclaimer of any authority over a

carrier that confined its business to one State, and was not engaged in such interstate business as would bring it within the first clause, the proviso was added. * * *

"The proviso, therefore, must be regarded as a disclaimer, and not as an exception. It could not, of course, be an exception to the second grant of jurisdiction over certain transportation, and it does not in any way refer to the first grant of jurisdiction over certain carriers, either by way of disclaimer or by way of exception. * * *

"This construction gives consistent and appropriate meaning to those provisions of the first section which define the scope and application of the entire enactment. It sustains the act as a comprehensive scheme of regulation, designed to include all interstate transportation wholly by railroad or partly by railroad and partly by water, when both are used under a common arrangement, **and to exempt only that intrastate transportation which is not within the power of Congress to regulate.**"

Adhering to the views then expressed, which are summed up in the last paragraph quoted, we hold that this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the act to regulate commerce, to exceed its constitutional power, and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect to such matters as are here in dsipute. If this construction be correct, it follows that the proviso in no way prevents the application of the third section to the facts of this case, and therefore it was within the authority of the Commission to make the order in question.

It is argued in the second place, as above stated, that the "undue preference" and "undue prejudice" which are declared unlawful by the third section of the act, as that section has been construed by the Supreme Court, can be predicated only upon the voluntary action of the carrier, and therefore the lower rates from Dallas than from Shreveport are not in violation of the third section, whatever may be the resulting disadvantage to Shreveport shippers, because such lower rates are not voluntarily accorded, but are imposed upon petitioner against its will by the Texas Commission.

This contention is based upon several decisions of the Supreme Court, particularly **East Tenn., etc., R'y Co. v. Interstate Com. Com'n, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed., 719,** and cases there cited and attention is called to the paragraph in the opinion in that case **(181 U. S. 18, 21 Sup. Ct., page 522, 45 L. Ed., 719)** in which the following language is used:

> "The prohibition of the third section, when that section is considered in its property relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

It will be observed that this case arose under the long and short haul clause of the original fourth section of the act, and involved the meaning of the phrase "under substantially similar circumstances and conditions," which was eliminated by the amendment of 1910. Act June 18, 1910, c. 309, Sec. 8, 36 Stat. 547 (U. S. Comp. St.

Supp. 1911, p. 1288). The real question at issue was whether competition at the longer distance point constituted or could constitute a dissimilarity or circumstances and conditions which relieved the road serving the shorter distance point from the obligation imposed by the fourth section, and the Supreme Court answered that question in the affirmative Examination of the opinion discloses clearly, as we think, that the convincing reason for this conclusion was the fact that the carrier complained of had not caused and was in no way responsible for the discrimination against the shorter distance locality. That discrimination as was shown, resulted wholly from the lower rates accorded by independent carriers reaching the farther point by other and different routes; and accordingly, it was held that the carrier in question, if its rates to the nearer point were reasonable, was not violating the act by meeting at a more remote point conditions there existing which it did not create and could not control. Manifestly, the factor deemed decisive in that case is wholly absent from the case at bar, and therefore the ruling then made, notwithstanding the statement above quoted from the opinion, cannot be accepted as sustaining petitioner's contention. Moreover, the administrative authority of the Commission has been materially increased by the amendments of 1906 and 1910, as the Supreme Court observed in the recent **Proctor & Gamble Case, 225 U. S., 282, 297, 32 Sup. Ct. 761, 56 L. Ed., 1091,** and it may be open to doubt whether decisions under the former fourth section would be followed in cases arising under the amended statute.

[3] This, of course, does not meet the argument, based upon the different state of facts here presented, that petitioner is under compulsion as respects the State rates in question, and therefore not chargeable with any violation of law because those rates are relatively much lower than its interstate rates from Shreveport. In the last analysis this claim of coercion would seem to beg the question to be decided, since it assumes that petitioner is bound at all events to observe the rates fixed by the Texas Commission although the order sought to be enjoined justifies the application of higher charges. But if the action of the Texas Commission regarding these ontrastate rates is in derogation of the regulating power of Congress, the petitioner is not bound by that action, but has the right to readjust its schedules in conformity with the order of the Interstate Commerce Commission.

In the report upon which that order is based the Commission has found, upon convincing proofs therein recited, that the local rates here involved were imposed by the Texas Commission for the purpose of favoring the industries and communities of that State. Indeed, the evidence is said "to demonstrate that Texas has a policy of her own with respect to the protection of home industry, which has been made effective by consistent and vigorous action on the part of her Commission." And in this policy, as is further found, the petitioner and other carriers in like situation have apparently acquiesced. This plainly means, nor is it seriously disputed, that these Texas rates were prescribed, not with reference to their intrinsic reasonableness or on the basis of just compensation for the service rendered, but with the undisguised intention of giving preference and ad-

vantage to the dealers of that State as against their competitors in Louisiana and other States. As Commissioner Lane puts it:

> "The Texas Commission is acting in **loco parentis** to the jobbing interests of Texas."

It also means, as the record indicates, that the rates so established have been accepted by petitioner without more, at most, than a perfunctory protest. In view of these uncontradicted facts, we are constrained to reject the plea of compulsion, not merely or mainly because petitioner has assented to the protective policy of the Texas Commission, but because that policy directly affects other States, and the flow of commerce from those States, and thereby encroaches upon the field in which Federal authority is exclusive and supreme. To hold otherwise in this case is virtually to admit that the purpose of the Federal act may be thwarted and its operation made ineffective by the laws and administrative effort of the State of Texas. It is evident, as already stated, that these Texas rates were designed and have the necessary result of securing unjust and arbitrary advantage to the shippers for whom they were provided, by restricting the movement of commodities from other States and measurably excluding outside dealers from competing for trade in Texas territory. The effect of this action by the Texas Commission is not merely incidental and unimportant, but direct, substantial, and to an extent prohibitive. In our judgment it is a positive interference with interstate commerce, which Congress alone has power to regulate, and constitutes a violation of the law which Congress, in the exercise of its

power, has duly enacted. The pervading purpose of that law was to prevent carriers subject to its provisions from indulging in unfair and burdensome discriminations against persons and localities engaged in interstate commerce.

But if such a patent discrimination as this case discloses cannot be reached, because it is brought about by a State Commission, the law fails in a most important respect to accomplish its wholesome purpose. Moreover, if one State Commission may create and perpetuate such a discrimination, other State Commissions may take similar action for similar reasons, with results which would greatly impair, and indeed largely defeat, the effectiveness of Federal regulation. To say that conditions thus arising do not offend the Federal law, and cannot be corrected by the Commission appointed to administer that law, is to say in effect that State authority is superior to Federal authority when they come in conflict, whereas the reverse proposition has been repeatedly and invariably affirmed by the Supreme Court of the United States.

It is not claimed that the precise question here presented has been passed upon by the Supreme Court, but in various decisions of that Court, principles have been laid down which seem to us clearly applicable if not controlling. For example, in the **Eubank Case, 184 U. S., 36, 22 Sup. Ct. 280, 46 L. Ed., 416,** Mr. Justice Peckham uses the following language:

> "We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of

> enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident."

Later, in the **Pullman Company Case, 216 U. S., 65, 30 Sup. Ct. 235, 54 L. Ed., 378,** Mr. Justice (now Chief Justice) White states certain propositions which are said to be "so conclusively established by the previous decisions of this Court as to be now beyond dispute." Among them are these:

> "A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. * * * Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce, if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on."

And more recently, in **Southern R'y Co. v. United States, 222 U. S., 23, 32 Sup. Ct., 4, 56 L. Ed., 72,** affirming the validity of the Safety Appliance Acts, Mr. Justice Van Devanter states the principle governing the question there considered, as follows:

> "And this is so, not because Congress possesses any power to regulate intrastate commerce as

> such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it; that is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

This Court, also, in **Penn. R. Co. v. Interstate Com. Commission, 193 Fed., 81,** following the **Illinois Central Case, 215 U. S., 452, 30 Sup. Ct., 155, 54 L. Ed., 280,** upheld orders of the Commission relating to the distribution of coal cars in times of shortage. And in reply to the argument that the carrier could not comply with the orders in question without violating a statute of the State we said:

> "It may also be true that the enforcement of regulations in conformity with these orders, if applied to cars for intrastate as well as interstate shipments, would result in some conflict with the duties of petitioner under the laws of Pennsylvania; * * * but, if this is or proves to be the case, it furnishes no ground for our interference, since Federal authority to the full extent that it may be exerted supersedes and limits State authority."

It is true that the laws and orders involved in these decisions pertain to the physical operation of interstate railroads, and not to the relations between State and interstate rates; but in our opinion, the underlying ques-

tion is essentially the same in both classes of cases, and the doctrine of the supremacy of Federal authority should have the same controlling application in the latter as in the former. If State regulation under State laws, respecting such matters as safety appliances, car distribution, and the like, must be subordinated to and may be virtually annulled by national regulation under the national laws now in force, there is even greater reason for asserting the sufficiency of the existing acts of Congress, and the authorityof the tribunal by which they are administered, to remove such a palpably unjust and injurious discrimination in freight charges as is here presented, although that discrimination is caused by the action of the State Commission. This is not to interfere with any power of regulation which a State may rightfully exercise, which does not "affect other States," or materially impede the flow of commerce from one to another, but to give complete and adequate potency to the law which Congress has enacted in pursuance of its plenary and exclusive power to regulate commerce "among the several States." As is said by Sanborn, Judge, in **Shepard v. Northern Pac. Ry. Co. (C. C.), 184 Fed., 795,** after referring to the **Eubank Case, supra:**

> "By the same mark, because it is a direct regulation of interstate commerce, the nation may regulate and prohibit discriminations wrought by an undue difference between interstate and intrastate rates, although such regulation or prohibition may also to some extent affect and regulate intrastate commerce. For to the extent necessary completely and effectually to regulate interstate commerce the nation by the Congress and its courts may affect and regulate intrastate commerce."

It is the duty of an interstate railroad so to adjust its schedules that all dependent shippers and communities, regardless of imaginary State lines which may divide them, shall be able to use its facilities on relatively equal terms; and the Interstate Commerce Commission, in our judgment, is empowered by the present law to enforce the performance of that duty as occasion may require. The necessity for uniform, comprehensive, and adequate regulation, especially urgent in the vital matter of rate relations, compels assertion of the paramount authority of Congress and the appropriate exercise of that authority in those provisions of the act which are leveled against unjust discriminations, wherever or however caused. Indeed, we see no escape from multiplied difficulties arising under our dual form of government, except by broadly defining the constitutional power of Congress, and its exertion as manifested in the enactment of the prssent law, and by upholding the full application of that law to such controversies as the one here considered. We are, therefore in accord with the views of Commissioner Lane, speaking for the majority of the Commission, as expressed in the following extracts from his report:

> "An interstate carrier must respect the Federal law, and if it is also subjected to State law it must respect that in so far as it can without doing violence to its obligations under the national authortiy. Before us are carriers which undeniably discriminate directly against interstate traffic. To this charge they plead that all they have done was to obey the orders of a State Commission, as against which they were helpless. They appealed to no court for relief, nor to this Commission.

> When the State of Louisiana, after years of endurance, makes complaint to this body, these carriers make no showing of the reasonableness of their rates, other than that heretofore dealt with —a traffic adjustment equalizing gateways—and even in this defense all the carriers did not join. * * * While the Texas Commission has evidenced a policy of home protection for its own State cities, there is every evidence that the carriers moving into and within Texas accepted this policy as their own, claiming that not to have adopted it would have led to reprisal on the part of the State authorities. Such conditions may not continue under this act. The interstate carrier which adopts a policy, even under State direction, that makes against the interstate movement of commerce, must do so with its eyes open and fully conscious of its responsibilities to the Federal law, which guards commerce 'among the States' against discrimination."

The Interstate Commerce Commission investigated the complaint filed with that body on behalf of the shippers and dealers of Shreveport. In its report of that investigation, and upon proofs that seem to permit no other conclusion, the Commission found the fact of unjust discrimination as alleged, and duly made an order requiring its removal. The Commission also found by necessary inference, as its order clearly indicates, that the interstate commodity rates in question were not unreasonable, and this in effect sanctioned the continuance of those rates. It is likewise a necessary inference from the report and order that the unlawful discrimination against Shreveport, so far as commodity rates are concerned, was caused by the imposition of intrastate rates

which are lower than petitioner is justly entitled to charge. This being so, it follows that petitioner is at liberty and has the right to comply with the Commission's order by making a proper increase of its Texas rates. Indeed, since its interstate rates are not excessive, such an increase appears to be the only method of compliance which would be just to both shipper and carrier.

When this order was made, upon the facts so ascertained and reported, it had the effect, in our judgment, of relieving petitioner from further obligation to observe the intrastate rates which the Texas authorities had prescribed. The petitioner was no longer under compulsion in respect of those rates, because the rate situation disclosed by the inquiry was subject in its entirety to the provisions of the Federal statute and the administrative control of the Commission. The order of the Commission, therefore, operated to release petitioner, as regards the intrastate rates in question, from the restraint imposed by the State of Texas; and thereupon petitioner became entitled, if it did not choose to reduce its interstate rates, to comply with the order by advancing its Texas rates sufficiently to remove the forbidden discrimination. Its obedience was due to the superior authority, and it ceased to be bound by any inconsistent obligations. Whether petitioner should have applied to the courts for relief in the premises, basing its application upon the Commission's order and the rights of petitioner thereunder, or could advance its Texas rates in the first instance, relying upon the order as a defense against and prosecution under Texas laws, is not for us to determine. It is sufficient to hold, as we do, that petitioner cannot resist the order on the ground of involuntary action, be-

cause the effect of that order was an exemption of these intrastate rates from Texas authority.

As was suggested at the outset, the general question here involved has been presented in numerous cases, more or less closely allied, and is, perhaps, the most conspicuous and important subject of current litigation. In the course of that litigation every decision of possible bearing has been repeatedly cited and every opinion critically examined, whilst the ablest lawyers in briefs and at the bar have exhausted the resources of argument. We can add nothing to what has been so often said, and deem it unnecessary to extend the discussion. In our judgment, the order in question was within the authority of the Commission, and ought not to be set aside.

The petition will therefore be dismissed.

Mack, Judge (concurring). I agree that an intrastate rate voluntarily established by the railroads may be the basis for an order of the Interstate Commerce Commission declaring such a rate to involve an undue prejudice as against an interstate rate, and requiring that the two rates be equalized. I fully agree, also, that Congress has the constitutional power and may by proper legislation grant to the Interstate Commerce Commission authority to prevent undue prejudice in interstate commerce resulting from a rate not in the true sense voluntary, and irrespective of whether it be interstate or intrastate.

In view, however, of the passage cited from **E. R'y Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct., 516, 45 L. Ed., 719,** and of the decision of this Court in **Atchison, T. & S. F. R'y Co. v. U. S., 191 Fed., 856,** now pending on appeal in the Supreme Court, I am of the opinion that the Interstate Commerce Commission under

the legislation now in force cannot base such an order upon a compelled rate, whether interstate or intrastate, and whether compelled by competition, by statute, by court decree or by the order of a Commission.

In my judgment, the Texas State rates cannot be treated by the Interstate Commerce Commission as if they were absolutely null and void even if upon direct attack in the State or Federal Courts, they might be nullified and their enforcement permanently enjoined as infringing upon the exclusive power of the Federal government to regulate interstate commerce. In the absence of a judicial decree, temporarily or permanently suspending the force and effect of the Texas rates, the railroads would be compelled to obey them, just as the railroads and the public are required to observe interstate rates duly made and published by the railroads, even though they be such as would be set aside for unreasonableness, unjust discrimination, or undue prejudice on direct attack before the Interstate Commerce Commission.

[4] The order of the Interstate Commerce Commission, therefore, gives only an apparent, but not a real, alternative, either to raise the Texas rates, or to lower the interstate rates; in effect it compels the reduction of the interstate rates to a point far below what the Commission itself considers a reasonable rate, at least until a court of competent jurisdiction shall have enjoined the enforcement of the Texas rates. If the Texas rates here in question must necessarily be held to be involuntary and compelled, I should be of the opinion that the order of the Interstate Commerce Commission must be set aside.

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In my judgment, the Texas State rates cannot be treated by the Interstate Commerce Commission as if they were absolutely null and void even if upon direct attack in the State or Federal Courts, they might be nullified and their enforcement permanently enjoined as infringing upon the exclusive power of the Federal government to regulate interstate commerce. In the absence of a judicial decree, temporarily or permanently suspending the force and effect of the Texas rates, the railroads would be compelled to obey them, just as the railroads and the public are required to observe interstate rates duly made and published by the railroads, even though they be such as would be set aside for unreasonableness, unjust discrimination, or undue prejudice on direct attack before the Interstate Commerce Commission.

[4] The order of the Interstate Commerce Commission, therefore, gives only an apparent, but not a real, alternative, either to raise the Texas rates, or to lower the interstate rates; in effect it compels the reduction of the interstate rates to a point far below what the Commission itself considers a reasonable rate, at least until a court of competent jurisdiction shall have enjoined the enforcement of the Texas rates. If the Texas rates here in question must necessarily be held to be involuntary and compelled, I should be of the opinion that the order of the Interstate Commerce Commission must be set aside.

[5] Inasmuch, however, as there seems to be some basis, though slight, for the view that the failure of the railroads to attack the Texas rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be said to have been not compelled, but voluntary, in the sense of having been voluntarily assented to, instead of having been actively attacked, and inasmuch as the conclusions of my Brethren are based in part at least upon this view, I concur, for this reason only, in upholding the Commission's order.

HOUSTON E. & W. T. R'Y. CO. ET AL.

versus

UNITED STATES (INTERSTATE COMMERCE COMMISSION ET AL., Intervenors).

(Commerce Court, April 25, 1913.)

No. 67.

Petition by the Houston East & West Texas Railway Company and others against the United States of America, in which the Interstate Commerce Commission, the Railroad Commission of Louisiana, the St. Louis Southwestern Railway Company, and others intervene. On final hearing. Petition dismissed.

For opinion of Interstate Commerce Commission, see **Meredith v. St. Louis Southwestern R'y Co., 23 Interst. Com. Comm. R. 31.**

H. A. Scandrett, of Chicago, Ill., and H. M. Garwood, of Houston, Tex., for the petitioners.

Winfred T. Denison, Asst. Atty. Gen. (Thurlow M. Gordon, Sp. Asst. Atty. Gen., on the brief), for United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Luther M. Walter, of Chicago, Ill. (R. G. Pleasant, Atty. Gen., and W. M. Barrow, Asst. Atty. Gen., on the brief), for Railroad Commission of Louisiana.

E. B. Perkins, of Dallas, Tex., S. H. West and Roy F. Britton, both of St. Louis, Mo., Daniel Upthegrove, of Dallas, Tex., Joseph M. Bryson, of St. Louis, Mo., and Alex. S. Coke and A. H. McKnight, both of Dallas, Tex., for intervening carriers.

Before **Knapp**, Presiding Judge, and **Hunt, Carland**, and **Mack**, Judges.

Knapp, Presiding Judge. This case involves the same question as Texas & Pacific R'y Co. v. United States et al., 205 Fed., 380, just decided. For the reasons stated in the opinion in that case, the petition will be dismissed.

Supreme Court of the United States

OCTOBER TERM, 1913

HOUSTON EAST & WEST TEXAS RAILWAY COMPANY and HOUSTON & SHREVEPORT RAILROAD COMPANY, et al,

Appellants.

vs.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, et al,

No. 587

Appeal from the United States Commerce Court

BRIEF FOR INTERVENOR, THE RAILROAD COMMISSION OF LOUISIANA

S. C. PLEASANT
R. W. [illegible]
H. W. ROBERTS
JOHN S. SUMMERHORE
LUTHER M. WALTER
Attorneys for Intervenor

THE HALL-CROSSLEY PRINTING COMPANY, CHICAGO

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LIST OF CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

HOUSTON EAST & WEST TEXAS RAILWAY COMPANY and HOUSTON & SHREVEPORT RAILROAD COMPANY, et al,

Appellants.

vs.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, et al,

No. 567

Appeal from the United States Commerce Court

BRIEF FOR INTERVENOR, THE RAILROAD COMMISSION OF LOUISIANA

STATEMENT OF CASE.

This case comes here on appeal from a decree of the United States Commerce Court dismissing the petition of the appellants; said petition sought to enjoin an order of the Interstate Commerce Commission (Rec. 57) which

required the appellants (defendants before the Commission) to desist, on or before May 1st, 1912, and for a period of not less than two years thereafter, to abstain from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Houston, Texas, and points intermediate thereto, than were contemporaneously exacted for the transportation of such article from Houston, for an equal distance towards Shreveport, said relation of rates having been found by the Commission to be reasonable. From said decree dismissing the petition appellants appealed to this court (Rec. 106-110), and assign various errors, (Rec. 107).

On March 8th, 1911, the Railroad Commission of Louisiana, acting under instructions from the Legislature of that state, filed a petition with the Interstate Commerce Commission against the appellants, Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company, the intervenors St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and Missouri, Kansas & Texas Railway Company of Texas, and also Eastern Texas Railway Company, Texas & Pacific Railway Company, Gulf, Colorado & Santa Fe Railway Company and International & Great Northern Railroad Company, complaining that rates from Shreveport, La., over the lines of the carriers named, to points of destination in eastern Texas, were unjust and unreasonable, in violation of Section 1 of the Act to regulate commerce, and subjected shippers from Shreveport to such destinations to unjust discrimination and gave an undue preference to shippers from Houston, Dallas, Waco, Fort Worth and other points in Texas.

The prayer of the complaint was that the Interstate Commerce Commission require the same basis of rates between Shreveport and east Texas points as was accorded by the defendants to Texas competitors of Shreveport interests for the same distances.

The Interstate Commerce Commission, after due and regular hearing, made its report and order on March 11, 1912, (Rec. 19-60) 23 I. C. C. 31-68. The Commission was not unanimous, there being six separate opinions, the majority opinion by Commissioner Lane (Rec. 21) and concurring opinions by Commissioners Prouty (Rec. 36) and Clark (Rec. 39), while dissenting opinions were written by Commissioners Clements (Rec. 40) Harlan (Rec. 41) and McChord (Rec. 43).

In its report and order the Commission found that the class rates complained of out of Shreveport to points on lines of the Texas & Pacific and of the appellants were unjust and unreasonable; these rates were very materially reduced and the order prescribed reasonable class rates, as maximum rates, from Shreveport to the several stations in eastern Texas on the lines of the appellants and the Texas & Pacific Railway.

The Commission further found that the relation of rates upon articles taking commodity rates was unjust and unreasonable by reason of the fact that a much higher basis, mile for mile, was applied from Shreveport than from competing points in Texas to destinations of the same distance with no dissimilarity in transportation conditions. The carriers were required to maintain no higher commodity rates mile for mile from Shreveport

to Texas points, than were maintained from Dallas and Houston to points an equal distance therefrom in eastern Texas.

The third provision of the order required the same rules and practices concerning the concentration of Texas cotton at Shreveport as was contemporaneously observed by the carriers on cotton concentrated in Texas.

The carriers have abandoned their attack against the first and third clauses of the order and here challenge only that portion of the order which requires commodity rates from Shreveport to Texas destinations to be equalized with rates from competing Texas points.

While the opinion of the Commerce Court expressly states that "the Commission has found, in effect, that petitioner's interstate commodity rates from Shreveport to these Texas destinations are reasonable rates for the service rendered; that is, a rate which conforms to the first section of the Act, and which, therefore, petitioner may justly and legally charge" we have looked in vain in the Commission's opinions for any such statement. Such an impression might be gained from the fact that the Commission did not, in so many words, require the carriers to reduce the commodity rates from Shreveport to the level of the Texas commodity rates, and permitted the carriers to correct the unjust discrimination, in part at least, by an increase in the Texas commodity rates. But the order of the Commission goes further; it provides that in equalizing the interstate and state rates the interstate rates must not exceed the scale of class rates prescribed in the

first portion of the order. The important fact is, *the commodity rates complained of* by the Railroad Commission of Louisiana *exceed the class rates prescribed by the Commission from Shreveport to Texas points.* To the extent that the commodity rates complained of exceed class rates found reasonable by the Commission, the commodity rates were in fact found to be unjust and unreasonable, as well as unjustly discriminatory.

THE STATUTE.

Sec. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or

Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.* * * * * * * * * * * *

Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other

person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

STATEMENT OF FACTS.

The territory in Texas to which the Commission has established rates is what is known as East Texas. Shreveport is one of the oldest distributing points west of the Mississippi River. Long before railroads had been built out of Shreveport to the west the supplies of all Texas and of many other states north and west were hauled by team from Shreveport. With the advent of the railroad these supplies moved by rail. Until the year 1898, Shreveport enjoyed a large share of the Texas business.

Shortly after the Railroad Commission of Texas was established that body adopted a policy intended to build up jobbing centers in that state. This policy was made effective in two ways, first by the establishment of a flat

mileage rate, and second by a heavy reduction in local or restricted rates in order to meet what the Texas Commission regarded as an unjust reduction in interstate rates upon products which were sold by Texas merchants.

The reports of the State Commission of Texas to the Governor show the establishment of this policy and the record before the Interstate Commerce Commission contains emergency orders of the Texas Commission covering a large tonnage of many and varied articles of transportation; each of these orders almost without exception states that the purpose of the same was to remove an unjust discrimination against the business interests of citizens of Texas resulting from a reduction in interstate rates and from the carriers' refusal to increase interstate rates. In many instances, these emergency rates were so low as to be less than the cost of service as the evidence before the Commission shows. No final contest in the courts was made upon any of the class or commodity rates so established. The carriers complied with all the requirements of the Texas Commission, although such emergency rates were concededly to the disadvantage of the interstate shipper.

For the purposes of this brief we set forth fully extracts from the Texas Commission's reports showing the policy above referred to. From these reports it clearly appears that appellants have been compelled, either through fear or favor, to establish the adjustment found unlawful by the Commission.

In the Third Annual Report of the Texas Commission, page VII, it was said:

The stability of interstate rates is also more secure under the indirect influence of the Commission.

The policy of this Commission is to preserve an equitable and just relation between state and interstate rates to competitive points in Texas, and to preserve to the people of Texas the advantages of their location. In pursuance of this policy, the Commission has determined to meet reductions in interstate rates by a corresponding reduction in state rates on any given article manufactured or produced in this state, particularly if it appears that the purpose of the cut in interstate rates is to deprive the home product of its legitimate market. This purpose has been repeatedly announced to the managers of railroads in Texas, and has no doubt exercised a considerable influence in maintaining interstate rates.

In the Fourth Annual Report, for the year ending June 30, 1895, the Commission states its purpose frankly and fully. We quote from pages 15, 16 and 17:

The Commission's policy has been to encourage the interests of Texas merchants and manufacturers, and to do this reductions of rates have frequently been necessary. The figures will show that, as a general proposition, it is more profitable to a Texas road, in the transportation of a given quantity of goods in less than carloads, to make the haul wholly within the limits of the State than to transport the same quantity of like goods as one of a number of connecting lines operating from points beyond the limits of the State, the difference being that the divisional part of a Texas road of a through interstate less than carload rate is usually less than the local less than carload rate it receives on shipments from one point in Texas to another, added to the divisional part the carrier receives on carload shipments to Texas distributing points. The business of Texas merchants and

manufacturers being stimulated and increased, and the earnings of the companies being augmented by doing more Texas business and less outside business, it is not improbable that the Commission's policy has had something to do in producing the result of larger earnings upon lower local rates, when it is considered that the reductions which have been made have been made cautiously, with the view of not diminishing the revenues of the carriers, but with regard to the fact that upon lower local rates our roads can earn more money than they get upon the divisions of interstate rates. This idea is fortified by the fact that for the year ending June 30, 1895, business originating in Texas increased 3 per cent more than interstate traffic destined to Texas points. In advancing this idea, none of the benefit is ascribed to the general merchandise tariff elsewhere discussed and which did not take effect until August 6, 1895, after the time covered by the reports of the companies. That the general merchandise tariff will operate in the same beneficial manner, in improving the business of Texas merchants and manufacturers, with benefit to the carriers, notwithstanding reduced local rates, we do not doubt.

* * * * *

This Commission in establishing rates on freight in this State was controlled in a large measure by the rates made on interstate shipments, which it could not control. Our action in making rates in the past has been seriously embarrased by the lower rates, relatively, which were made on commodities and merchandise shipped into and out of the State, than those which prevailed on shipments wholly in the State; and also by the failure of the railroads to maintain even lower rates on interstate shipments. These facts will explain, in part at least, the necessity which com-

pelled us to reduce rates in many instances.

For the most of the time since this Commission has been in existence, the interstate rates have been so made as to make but little difference between carload and less than carload rates, and in this way to make cities outside of this State the jobbing centers for our people, and in this way also to seriously embarrass or to prevent manufacturing in this State, and to prevent in a large measure the merchants of this State from doing a wholesale business. To illustrate this view, the carload rates on interstate shipments to all the common-point territory in this State are the same. Now if the less than carload rates are the same or nearly the same on such shipment to the same points, it will be seen that when our merchants pay the carload rate on such shipments, and are then obliged to pay our local state rates on sending out merchandise, they would be unable to compete successfully with the less than carload rates from points outside of Texas. The constant effort of this Commission from its earliest organization has been to secure a correction of this wrong done to the merchants and manufacturers of this State. And it affords us much satisfaction to be able to state that by the action of the Southwestern Traffic Association in May last they made a moderate reduction in the freight rates on carloads of a considerable number of commodities, which, by widening the difference between carloads and less than carloads, met to some extent the expressed wishes of this Commission in that respect, and was a considerable relief to our wholesale merchants and manufacturers.

While recognizing the benefit of the adjustment made by the Southwestern Traffic Association on June 1, 1895, yet it having been made to appear to us that the arrangement did not afford as complete re-

lief as was demanded by the interests of Texas merchants and manufacturers upon certain articles, as a further remedy we promulgated commodity tariff No. 16, which will be found in Exhibit No. 1 of the Appendix, and which comprises said articles, fourteen in number. By this tariff the distance to which our merchants and manufacturers can ship the goods covered by said tariff in less than carload quantities in competition with outside merchants and manufacturers has been extended, and as a consequence home enterprises have been fostered; and not only have such enterprises been benefited, but retail merchants and consumers doing business and residing near jobbing and manufacturing centers have been correspondingly benefited. That all has been done that should be done to promote the interests of home jobbers and manufacturers, with justice to outside competitors, we do not assert; yet that much has been accomplished cannot be gainsaid.

We trust that the Southwestern Traffic Association, of which the Texas roads are members, will not fail to accord to Texas commercial interests the fair treatment to which they are entitled by the adoption of further measures to place our merchants and manufacturers on a basis of equality with those outside of the State.

That the Texas Commission was not concerned with the amount of the rate but rather with the relation of the state to the interstate, appears from the following statement in the same report, page 19:

This Commission has often stated to the freight agents and traffic managers in their meetings with it, that if the railroad companies engaged in interstate shipment would make and maintain rates which would be fairly compensatory to them on such shipments, this Commission would do all in its power, by

its rates, to secure them reasonable revenue on their railroad investments in this State. And we now repeat that statement. But this suggestion contemplates good faith on both sides in the making and maintenance of rates.

In the Fifth Annual Report, under the heading of "State and Interstate Rates Relatively," that Commission, on pages 5 and 6, emphasizes its policy of giving the Texas markets to Texas jobbers:

> To the consumer, upon whom ultimately falls the payment of freight rates, which are incorporated with the prices of all articles he uses, it is of little moment, apart from his general interest in the advancement of the prosperity of his State, whether the retailer, from whom he obtains his supplies, patronizes a Texas jobber or an outside jobber. To the retailer it is a matter of great interest, inasmuch as, if there are markets near at hand from which he can procure his goods, he not only is in a better situation to establish and preserve his credit with the wholesaler, between whom and himself there is often an intimate acquaintance, than he would be if he had to do business with strangers residing in other states, but he is relieved from the necessity of keeping in stock so large a quantity of goods as he would be compelled to keep if his market was more remote from his business, being enabled, by virtue of proximity, to have goods shipped to him from his neighboring jobber in time to replenish his stock to meet the demands of his trade; whereas, if he had to rely upon a more distant jobber, the delay in receiving goods would be incompatible with the same methods of business.
>
> But there is another view of the question that is still more important. To Texas as a whole it is of the most vital concern that there should be within her

limits, at proper places, jobbing and manufacturing establishments. Besides adding to the citizenship of the State a desirable population, and furnishing employment to persons already in our midst, and enhancing the taxable values of the State, and, as a consequence, under wisely administered government, aiding in ultimately reducing the rate of taxation, and besides the home market they afford to the tiller of the soil and other producers, including manufacturers, for their products, if men, in Texas, having the capital to engage in a wholesals business or in a manufacturing enterprise, for the success of which natural conditions are favorable, they have as much right to invest their means in such business or enterprise as a man in Illinois or Missouri has to embark in such business or enterprise in his State.

Some of the Texas lines of railway, constituting parts of interstate systems of railway interested in long hauls, appear to be hostile to a policy which would foster Texas jobbing and manufacturing interests, while other lines manifestly favor such a policy. Outside cities bring to bear every pressure they can to coerce all Texas lines into a course favorable to their interests and adverse to the interests of Texas cities with respect to jobbing and manufacturing.

* * * * *

This Commission has always had in mind the securing of relatively just state and interstate rates, with a view of enabling Texas merchants and manufacturers to do business in competition with outsiders. And, as shown by its last annual report, it has secured substantial benefits in this line. Besides what is there stated, it has, when its attention has been directed to changes in interstate rates, made corresponding changes in state rates whenever it could do so before the restoration of interstate rates. Oc-

casionally it has transpired that reductions have been made in interstate rates, but before the Commission could give ten days' preliminary notice required by law, and twenty days' notice after hearing before rates prescribed by the Commission can take effect, the interstate rates have been restored. In recommendations of legislation, the Commission in another place has suggested that the law be amended so as to enable the Commission to act in less time than is now necessary to establish a rate. To meet cuts in interstate rates such legislation is requisite.

Late in 1896, the various railroad companies in Texas made application for an increase of all rates upon articles transported within the State of Texas. We quote at length from the last mentioned report, pages 8, 9 and 10, from which the purpose of that Commission to regulate interstate traffic is clearly apparent:

> On the 15th day of September, 1896, nearly all of the railroad companies of Texas united in an application for an increase of all rates upon all articles transported upon railroads within the limits of the State. The principal ground of the application was that existing rates were not fairly compensatory, notwithstanding, as alleged, the companies had obtained all the revenue to which they were justly entitled out of interstate business. The Commission set the application down for hearing on the 20th day of October, 1896, but upon request of the applicants, accompanied by the statement that they could not within the time allowed collate the information demanded by the Commission in its notice of hearing, the investigation was postponed until the 4th day of December, 1896, when subsequent request of the applicants, based upon the same reason, the investigation was postponed until the 4th day of December, 1896, when the matter was regularly taken up. It soon being discov-

ered, in view of the requirement of the Commission, that the testimony should all be under oath from witnesses having personal knowledge of the facts, that the applicants were not ready to proceed, the hearing went over to the 8th day of December, 1896, when the applicants requested that the investigation be continued until further notice. The Commission consented to the continuance on the condition that the applicants would take up with it and consider propositions looking to a more satisfactory relative adjustment of state and interstate rates. The Commission in the setting of the application for hearing had not merely embraced in its notice the proposition of applicants to increase rates, but had also anounced in the notice that the Commission would in connection therewith, take up and consider the question of the proper readjustment, with respect to each other, of the rates applying within the State of Texas and the interstate rates to which petitioners were parties, by increasing or diminishing, so far as may be necessary to effect such readjustment, the rates now applying on freights transported between points in the State of Texas, and by insisting that petitioners will increase or reduce the interstate rates now existing and to which petitioners are parties, so far as may be necessary to secure such readjustment.

With the view to the proper determination of said subjects, the Commission in its notice submitted for discussion a number of inquiries, so framed as to elicit all the information necessary for deciding whether existing state rates are just and reasonable, whether existing interstate rates are just and reasonable, and whether the existing interstate rates are so adjusted as to operate fairly to the producers, manufacturers, merchants and consumers of Texas. The Commission did not feel disposed, when it gave the notice in the

form stated, nor has it ever been inclined, to deny to the railroad companies such rates as are reasonably compensatory, even though to do so would necessitate an increase in rates. Yet, as a condition precedent to anything like a general increase in state rates, the Commission was, and is, determined that the railroad companies shall show that they are receiving reasonable compensation for the transportation by them of interstate freights, in order that it may be seen by the Commission that they are not sacrificing their revenues on interstate hauls and seeking to recoup their losses against the people of Texas. Besides, knowing from experience that if the Texas lines unitedly exert themselves earnestly to secure any kind of readjustment of interstate rates, they are capable of accomplishing much in that direction, we deemed the occasion of the hearing of their application for an increase of state rates opportune for insisting that they endeaveor to secure a more satisfactory arrangement of interstate rates. In making the demand there was no injustice to the railroads, for viewed simply as roads operating in the State, it is to their interest to favor the policy of bringing goods from abroad into Texas cities in carload quantities and in distributing them from the jobbing houses in such cities in less than carload quantities among the retailers, as the freight charges they receive on local less than carload shipments in the State, added to what they receive in the division of through rates on carload shipments to the Texas jobber, usually amount to more than they receive in the division of through rates on less than carload shipments from a jobber outside the State to a retailer in the State; and it can be shown to be to their advantage to pursue a policy favorable to the development of manufacturing in Texas. While by pursuing, along the lines indicated, a course favorable to the up-

building of Texas jobbing and manufacturing enterprises, the interest of Texas roads considered as such would be subserved, yet, constituting, as some of the Texas roads do, parts of interstate systems, the interests of the systems rather than the interests of the Texas lines are too often regarded. Here lies the main difficulty, in our opinion, in securing a just arrangement of interstate rates. It can be met either by those lines which are not dominated by outside influences taking a firm stand and co-operating with this Commission to compel the other lines to act justly towards Texas interests, or, if adjustments can not be made by consent, by the Interstate Commerce Commission, with an intelligent grasp of the situation, when appealed to, making the proper adjustment.

The Commission is now preparing to take up with the Texas lines propositions looking to a readjustment of interstate rates in accordance with the views announced by it when the application of the railroad companies for increase of rates was postponed as above stated.

In order that its power might be greatly increased so as to control the interstate rates by directly penalizing the carriers on their local rates, that Commission made certain recommendations to the Texas Legislature. We quote from one of these recommendations, page 27 of the last named report:

Under the Interstate Commerce Law, carriers subject to that law and engaged in interstate transportation are authorized to reduce any rate upon three days' notice to the Interstate Commerce Commission, and they are empowered to increase any rate or rates upon ten days' notice to that Commission. The mischief we have in mind results from the reduction of interstate rates. Upon making reductions, after three

days' notice to the Interstate Commerce Commission, interstate lines transport for non-resident jobbers and manufacturers the articles upon which the rates have been reduced, to dealers in Texas. By reason of the reduced rates, the prices of the articles are cheapened to the dealers who are supplied with them during the period of low rates; and, taking advantage of the situation, such dealers soon stock up heavily with the articles. The Texas jobbers and manufacturers, whose rates have been made certain differentials lower than interstate rates, before their reduction, unexpectedly find themselves unable to compete with non-resident jobbers and manufacturers in the sale of the article upon which the interstate rates have been diminished, the differentials established under certain conditions being no protection to them against the suddenly changed conditions. Before the Texas jobbers and manufacturers can be relieved, thirty days must elapse; and generally within that time the injury has all been done, and interstate rates are restored by the time our rates can take effect. Invariably when there are serious reductions in interstate rates such reductions are intended to be temporary, and even if this Commission should take no action to meet the rates as cut, the interstate rates are restored after a brief season. This operates to the detriment not only of the Texas jobber and manufacturer, but also of all retailers who happen to be carrying a full stock of the article on which the rate is cut at the time it is made, and who are unable to purchase an increased supply of the articles even at diminished prices, as well as of all retailers who purchase the article after rates have been restored, because in both cases retailers who were not in a situation to avail themselves of the low prices resulting from the cut rates are at a disadvantage in competing with those who could and did get the benefit of the lower prices.

> The cutting of interstate rates by one line leads always to the cutting of rates by competing lines, thus engendering rate wars, which always involve serious losses to the conflicting parties as well as to the general public.

The result of this recommendation was the passage of the emergency rate law of Texas, by which the various emergency orders heretofore referred to were published; this law expressly authorizes the State Commission without notice or hearing to establish such rates as in its judgment are necessary, and is set forth as exhibit "B" to the petitions herein. (Rec. 60.)

The Texas Commission followed the policy of instituting suits for heavy penalties against the carriers for various violations of the law and then, after settling some of them, permitting the remaining suits to lie dormant upon the various court dockets of that State, later to be actively pressed if the carriers failed to do as the Texas Commission requested. We quote from the Seventh Annual Report for the year ending June 30, 1898, page 3:

> We mention further that by the aid of that appropriation this Commission had caused investigations to be made which showed that a number of the principal railroads of this State had violated the law, in the manner stated, a great many times. We also stated that up to the date of our last report, out of the number of cases reported to the Attorney-General, the offenders had plead guilty in ninety-five cases, and had paid a penalty of five hundred dollars in each case, without litigation, the companies composing what is known as the Southern Pacific System having paid $25,000, the International & Great Northern Railroad Company $10,000, and the Missouri,

Kansas & Texas Railway Company of Texas $12,500. It is proper to state that as to some of these companies many more instances of violations were found than were thus settled for, but the remaining cases have not been dismissed, being merely held in abeyance subject to further proceeding in the event that such companies again violate the laws. And it is also proper to state in this connection that this arrangement had at the time, and now, the full approval of this Commission.

The foregoing excerpts from the Annual Reports of the Texas Railroad Commission amply justify the contention we are here making, viz., that a direct and controlling influence has been exerted by the Texas Commission upon interstate rates by threats of reprisal, either in the way of reducing the local rates in the State of Texas or by fines and prosecutions for violation of some of the numerous regulating statutes of the State of Texas.

The Court will note that we have made no reference to recent annual reports of the Texas Commission. At the time the earlier reports were published there was little public attention given to the respective spheres of regulation by the State as against the Federal power. With the growing importance of that question the Texas Commission realized that it had been too frank and so thereafter contented itself with simply exercising the same activities in carrying out the same policy which had marked its earlier career, without proclaiming from the housetops what it was doing.

The carriers have testified in this case that they have been governed by the Texas Commission's wishes in a large degree in making interstate rates and even expressed a

fear that if the Interstate Commerce Commission reduced the rates from Shreveport as requested by the Railroad Commission of Louisiana, the Texas Commission would take action to reduce the State rates so as to maintain the present relative adjustment.

The opinion of the Commission quotes in full a letter by Chairman Mayfield of the Texas Commission to the Secretary of the Progressive League of Marshall, Texas, (Rec. 22). The letter is self explanatory and speaks in no uncertain language; reference is made therein to page 263 of the 19th Annual Report of the Texas Commission, containing the so-called Texarkana rate adjustment. This adjustment strikingly illustrates the policy of that Commission, to which we have made extended reference. In establishing a scale of jobbing rates, eighty per cent of the regular Texas distance tariff rates on a long list of articles, an exception was made under which the special rates were not applicable from Texarkana, Texas, or from Waskom, Texas, just across the line from Shreveport (Rec. 63). The purpose is obvious; if these rates had been made applicable from Waskom and Texarkana, Texas, the shippers of Shreveport, Louisiana, and Texarkana, Arkansas, could have gotten the benefit of them by draying their traffic across the state line. Some question having arisen as to the interpretation of this order, the State Commission afterwards issued a ruling that "rates provided in this adjustment are not applicable on shipments to or from Texarkana, Texas." 19th Report, Railroad Commission of Texas, 263.

The position of the Railroad Commission of Texas as set forth in their letters and reports is wholly re-

sponsible for the difference in charges exacted from shippers from Shreveport into Texas, as compared with charges for a similar haul in Texas, and we have no doubt that but for the action of the Texas Commission appellants herein would have established the same mileage rates over their lines of railway upon traffic from Shreveport as upon traffic wholly within the State of Texas. Appellants frankly admitted before the Interstate Commerce Commission that circumstances of transportation from Shreveport west into Texas are not different from those existing when the movement is from Dallas or Houston east for a similar distance over the same line of railroad. Having admitted that the cost of transportation was the same in each service the carriers justify their difference in charges solely by the fact that they were compelled by the Railroad Commission of Texas to publish a lower scale than they otherwise would have established.

The discriminations pronounced unlawful by the Act to regulate commerce are all those by any carrier engaged in interstate commerce which are unjust in their effect upon interstate commerce. The record in this case abundantly shows a restriction of trade from Shreveport into Texas that is well-nigh prohibitory. We have the expressed intention of the Railroad Commission of Texas to prohibit as far as it could the trade of East Texas being had with points outside the State of Texas. It undertook to build a Chinese wall across which no trade or commercial intercourse should be carried on if the wants or markets of Texas people could be satisfied with Texas products or if Texas products could find a market within Texas. It amounted practically to commercial secession. The rule

that the interference must be direct and not merely incidental and unimportant does not conflict with the facts in this case.

The discriminatory character of the relative rate adjustment condemned by the Commission is illustrated in the rate tables printed in the appendix to the report of the Commission in this case, 23 I. C. C. 65-66 (Rec. 52-56). We there find rates paid by the wholesale grocers, saddlery and vehicle dealers, furniture and stationery houses at Shreveport compared with the rates paid by their competitors in Texas for similar distances and into competitive jobbing territory. The wholesale grocers of Shreveport ought to be able to sell sugar in Center, Texas; but if they do so they must pay a rate of 35c per hundred pounds for a haul of 65.6 miles. There are competing wholesale grocers at Longview, Texas, 67.8 miles from Center, who enjoy a State Commission made rate of but 26c. On flour the Shreveport jobber must pay 35c to reach Center, while from Longview with a greater mileage, the rate is but 25.5.c. The rate from Shreveport to St. Augustine, Texas, a distance of 85 miles, is 39c both on sugar and on flour; from Beaumont, 120.5 miles, the rate on sugar is 38c and on flour is only 29c. A dealer in vehicles in Dallas, Texas, can ship a buggy to Elysian Fields, Texas, a distance of 155.2 miles for 56c; his competitor at Shreveport, only 53.3 miles from Elysian Fields, pays $1.57½—three times the rate for one-third the distance. Furniture is shipped from Dallas to Longview, a movement of 124 miles wholly within the State of Texas for 24.8c, while for the interstate haul from Shreveport to Longview, only 65.7 miles, the rate is 35c; for fifty per cent

of the distance the Shreveport dealer, because he is an interstate shipper, pays one hundred and fifty per cent of the rate of his intrastate competitor.

These rates are only illustrative. In the whole schedule of commodity rates there is no exception to the rule worked out by the Texas Commission that the Texas jobber shall have *a less rate for an equal or greater distance* than his interstate competitor at Shreveport.

Moreover the record before the Interstate Commerce Commission herein not only demonstrated conclusively the unfairness of the rate structure, but contains much testimony by the shippers of Louisiana showing the actual effect of this scheme of rates upon their business, and upon commercial conditions in eastern Texas. Merchants and dealers in a wide range of articles gave forceful testimony of their exclusion from Texas markets which they are fairly entitled by their location to reach on even terms with shippers and dealers at Dallas and other Texas cities. It would unduly increase the length of this brief to set forth in detail the facts appearing of record before the Commission. We do not understand that it is the province of the Court to examine into the facts where there was substantial evidence in support of the Commission's finding. The testimony before the Commission shows the effect of the adjustment which the Commission found to be unlawful and which its order will remove.

The Texas Commission has contended that Shreveport enjoys an advantage in its inbound rates, and indeed that contention was made by the appellants in their case before the Commission. If such were the case, a discrimination of that character can be remedied by an action before the

Interstate Commerce Commission involving the lawfulness of the inbound rates of Texas in their relation to the Shreveport rates. Such a situation is not to be corrected by a mal-adjustment of the outbound rates. In further reply to this contention we need say no more than to call the attention of the court to the decision of the Interstate Commerce Commission upon the complaint of the *Railroad Commission of Texas vs. Atchison, Topeka & Santa Fe, et al,* 20 I. C. C., 463, wherein upon a voluminous record the rates to Texas common points were fixed by the Commission on a basis prescribed as reasonable and non-discriminatory.

In its report the Commission found as follows (Rec. 36):

> That such carriers maintain higher rates from Shreveport to points in Texas than are maintained from cities within Texas to such points under substantially similar conditions and circumstances.
>
> That thereby an unlawful and undue preference and advantage is given to such Texas cities, and a discrimination that is undue and unlawful is effected against Shreveport.
>
> That the Texas & Pacific Railway Company shall cease and desist from charging higher rates upon any commodity from Shreveport into Texas than are contemporaneously charged for the carriage of such commodity from Dallas toward Shreveport for an equal distance.

The Commission has found as a matter of fact that the discrimination complained of was unjust and the preference undue. It also found affirmatively that the reasonable relation of rates is equal charges for equal distances

from Shreveport and from Dallas or Houston to points of destination in eastern Texas.

ARGUMENT.

The report of the Commission succinctly and clearly sets forth the law.

As we understand this case, it presents, under the decisions of this court, but one question. When the case was decided by the Commerce Court there were, perhaps, two questions for decision. First, has Congress the power under the Constitution to confer jurisdiction upon the Interstate Commerce Commission to make the order complained of; second, has it conferred such jurisdiction? As we understand the decision in *Simpson, et al, v. Shepard,* (the Minnesota rate case) 33 Sup. Ct. Rep. 729, the first question—as to the power of Congress—has been decided by this Court in the affirmative, and any doubt that may have remained after the long line of cases sustaining the power of Congress in the regulation of interstate commerce and all the agencies thereof, was completely dispellel.

The second question as to whether Congress has given the Commission jurisdiction to make the order complained of herein, is still open. We set forth pertinent portions of the Minnesota decision:

> If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of Federal regulation, should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to

the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the state, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

* * * * *

(3) When Congress, in the year 1887, enacted the Act to regulate commerce (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), it was acquainted with the course of the development of railroad transportation and with the exercise by the states of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation, in which the nature and extent of state legislation, including the commission plan, were fully reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st session). And it was the fact that beyond the bounds of state control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the 1st section of the Act to regulate commerce there was inserted the following proviso:

"Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid."

When in the year 1906 (act of June 29, 1906,

chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in § 1 was re-enacted. Again, in 1910, when the act was extended to embrace telegraph, telephone and cable companies engaged in interstate business, the proviso was once more re-enacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. (Act of June 18, 1910, Chap. 309, 36 Stat. at L. 545.) The proviso in its present form reads:

"Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state, and not transmitted to or from a foreign country, from or to any state or territory, as aforesaid."

There was thus excluded from the provisions of the act that transportation which was "wholly within one state," with the specified qualification where its subject was going to or coming from a foreign country.

It is urged, however, that the words of the proviso are susceptible of a construction which would permit the provisions of § 3 of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discrimination between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed (and it is not necessary

now to decide the point), it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. cas. 1075; *Baltimore & Ohio R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; *United States v. Pacific & A. R. & Nav. Co.*, 228 U. S. 87, ante, 443, 33 Sup. Ct. Rep. 443. In the present case there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review.

An examination of the opinion of the Commission shows that the Interstate Commerce Commission has not attempted to fix rates for transportation in Texas. Whatever effect the order complained of in this case may have

on intrastate rates is wholly indirect and inconsequential, so far as the power of the Commission is concerned. What the Commission has done is to exercise this power to remove a discrimination, which it is not challenged would, if voluntarily done by the carriers, amount to what is denominated by the law an *unjust* discrimination. The fact that a full compliance with the Commission's order may cause a change in state rates cannot bar the Commission from dealing with the situation so as to secure justice and equality among shippers. The order is not directed against transportation wholly within the State of Texas. And the order does not of necessity "apply" to the state rate. It has been held by this Court that the State Commission may prescribe rates for transportation within the state, although such rates may indirectly—but not directly—affect interstate rates. There is nothing inconsistent between such power in the State Commission and power in the Interstate Commission to remove an unjust discrimination, although such removal indirectly affects state rates. This is as we understand the law, and along that line is the expression of Commissioner Prouty in the concurring opinion (Rec. 38):

> The first section of our Act provides that it shall not "apply to the transportation of passengers or property wholly within one state," and it is said that we are thereby debarred from dealing with this situation since, as can not be denied, we affect the state rate. But our order is not directed against the state rate and does not of necessity "apply" to it, because it indirectly controls that rate. If this be not so then the converse must all the more be true and no state commission can establish a rate which directly or in-

directly affects an interstate rate, which is not in my opinion the law.

It is well settled that there is a broad field within which the state may act in the regulation of its transportation facilities until the federal government has exercised its authority under the commerce clause. A state can not apply its rate of transportation to that portion of an interstate movement which takes place within the territorial limits of a state, because the entire movement has been placed under the jurisdiction of the federal government and that jurisdiction is exclusive; but the state may, I think, establish the rate of transportation from point to point within its limits, although the effect of this is to indirectly require a change in interstate rates upon which Congress has not acted. When the federal authority does act, then the state cannot by its action interfere, for in case of actual conflict the state must yield, but the mere enactment of the act to regulate commerce is not a federal declaration that the interstate rates voluntarily established by carriers which have not been passed upon by the Interstate Commerce Commission are reasonable.

Our third section declares that no carrier subject to the act shall be guilty of undue preference and lays upon this Commission the duty of removing such preference when found to exist. It is no valid reason against the exercise of that authority that as a result some state rate must be changed.

In the Minnesota rate case, the railroads removed the discrimination against interstate shippers, resulting from their compliance with the orders of the Minnesota Railroad Commission, by extending the state-made rates to interstate traffic. They contested the Minnesota rates as unreasonable *per se,* and added, as a cause for declar-

ing them unconstitutional, the charge that they violated the federal constitution by directly influencing interstate rates. There was no contention by the interstate shipper that he was unjustly discriminated against by the action of the carriers in complying with the rate orders of the State of Minnesota.

In the present case, quite the contrary state of facts exist. Here the railroads operating in Texas, and running into Louisiana, complied with the Texas made rates, but did not extend such rates to interstate traffic, leaving the interstate shippers in Louisiana at a tremendous disadvantage. The discrimination thus created by the compliance by the carriers with the orders of the Railroad Commission of Texas, continued to exist, until removed by the order of the Interstate Commerce Commission, declaring it unjust. The duty rests upon the carrier of treating all it serves alike, and if discriminations so flagrant as those against Shreveport shippers seeking to enter Texas territory may exist, and be excused or tolerated on account of the declared policy of a State to make its intrastate rates so low as to favor its own citizens against those of another state, then both the spirit and purpose of the interstate commerce act is completely defeated.

We further find in the decisions of this court an interpretation of the proviso in Section 1 of the Act to regulate commerce and an affirmation of the power of the Commission to make an order which requires disclosure of all business of the carrier, although less than one per cent of its traffic is subject to the Act to regulate commerce. In the water line cases, *Interstate Commerce Commission vs. Goodrich Transit Company*, 224 U. S.

194, this Court, after quoting the provisions of the Act, as well as the proviso, said:

> The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one State was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce *wholly domestic.*

The Commerce Court had held that the orders concerning the report and auditing would be lawful respecting the interstate business done by carriers in connection with the railroads, but in requiring a report concerning the business not subject to the Act to regulate commerce, the Commission exceeded its authority and it therefore granted the prayers for orders of injunction and ordered a recasting of the form of the report so as not to require information as to intra-state traffic and port to port traffic not subject to the Act.

This Court further said in the course of the opinion:

> It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in its accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning business methods of the corporations subject to the Act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business." * * * *

It is contended that this construction of the statute enables the Commission not only to regulate the interstate business, but as well the wholly intrastate business of the complaining corporations, and is, therefore, beyond the power of Congress. Such cases are cited and relied upon by complainants as the *Employers' Liability Cases*, 207 U. S. 462, and *Illinois Central R. R. Co. v. McKendree*, 203 U. S. 514. In those cases acts of Congress and orders of executive departments were held void because they undertook to regulate matters wholly intrastate, as distinguished from those matters of an interstate character and within the legislative power of Congress. And what we have already said as to the character of these orders is enough to indicate that in our opinion they are not regulations of intrastate commerce.

So in this case requiring equal treatment of all interstate shippers and the establishment of such rates as gives shippers from Shreveport to Texas points equal opportunity to engage in the trade of that portion of Texas, is not a regulation of transportation wholly within the State of Texas. We have already called attention to the fact that the carriers can prescribe rates from Shreveport to Texas in conformity with the order of the Commission without changing in any wise the rates which the carriers apply on traffic wholly between points within the State of Texas. It well may be that the word "wholly" as used in the Act to regulate commerce contemplates that transportation as is said in *Gibbons vs. Ogden*, 9 Wheat. 1, "*which is completely internal, which is carried on between man and man in a state or between different parts of the same state, AND which does not extend to or AFFECT other states.*" This Court must

have had some such distinction in mind when in the Goodrich Transit case it refers to the proviso as excepting commerce "wholly domestic."

This Court had before it a kindred subject matter in the Car Distribution cases. We desire to analyze in detail the decision of this Court and to mention the points of resemblance from which we think a conclusion favorable to our contentions in this case must inevitably be drawn.

In the Car Distribution cases, *Illinois Central v. Interstate Commerce Commission*, 215 U. S. 452, this Court affirmed an order of the Interstate Commerce Commission, directing the counting of company fuel cars in making daily distribution of coal cars in times of car shortage to bituminous coal mines along the line of the Illinois Central Railroad. The Commission had required the Illinois Central to count in its system of distribution three classes of cars, viz: private cars, fuel cars of foreign railroads and company fuel cars. The Commission had found that failure or refusal to take into account these three classes of cars "in the distribution of coal cars for, *or affecting*, interstate shipments of coal among the various coal operators along their lines" (Transcript of Record, No. 502, October Term, 1908, No. 233, October Term, 1909, page 61) was an unjust discrimination. The Commission required the carriers to "maintain and enforce a practice of regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, *or as affecting*, interstate shipments of coal."

The case was heard before Grosscup, Baker and Kohlsaat, circuit judges, who sustained the order of the Commission on the first two classes of cars, viz: private cars and fuel cars of foreign railroads. It was urged by the railroads against the validity of the order that as to private cars (Transcript 233 October Term, 1909, page 62, quoting from the opinion of the Circuit Court only):

> It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers can not be required to take into consideration the cars of shippers who do only an intrastate business.
>
> Where Federal authority exists it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions, and regulations of the carriers, all must give way.

That Court, however, found that in the case of cars loaded with company fuel "commerce in these instances ends at the tipples" and that from that time on there was no consignor, no consignee, no shipper, no common carrier, no freight, and no vehicle transporting a commodity in commerce.

The carriers did not appeal from that portion of the decree sustaining the Commission's order as to private cars or foreign fuel cars. The Commission appealed from that part of the decree which enjoined the Commission's order

so far as it applied to company fuel cars. This Court in its opinion by the present Chief Justice, said:

> As the Interstate Commerce Commission alone has appealed, it is patent that those portions of the order of the Commission which concern foreign railway fuel cars and private cars, and which the court below refused to enjoin, are not open to inquiry. The suggestion at once presents itself whether, if these subjects are not open, they do not necessarily carry with them the question of company fuel cars, on the ground that the three classes rest upon one and the same consideration, and that to divorce them would bring about conditions of preference and discrimination which the act to regulate commerce expressly prohibits. In view, however, of the great importance of the questions directly arising for decision, and the fact that the court below has treated the company fuel cars as distinct, we shall not be sedulous to pursue the suggestion, and come at once to the propositions of power previously stated.
>
> First. *That the act to regulate commerce has not delegated to the Commission authority to regulate the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.*
>
> When coal is received from the tipple of a coal mine into coal cars by a railway company and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form, these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under the

conditions stated is not commerce, it is therefore not within the authority delegated to the Commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce. It is to be observed, in passing, that if the proposition be well founded, it not only challenges the authority of the Commission, but extends much further, and in effect denies the power of Congress to confer authority upon the Commission over the subject. In all its aspects, the proposition calls in question the construction given to the law by the Commission in every case where the subject has been before it, and also assails the correctness of numerous decisions in the lower Federal court, to which we have previously referred, where the subject, in various forms, was considered. It goes further than this, since it, in effect, seeks to avoid the fair inferences arising from the regulations adopted by the railroad company. Those regulations, in providing for the obligation of the railroad company to supply cars, and recognizing the duty of equality of treatment, found it necessary, by express provision, to provide that private cars, foreign railway cars, and company fuel cars should not be counted against the mine on the day when furnished, thus implying that, under the general rule of equality, if not restricted, it was considered the duty would exist to consider such cars. The contention, moreover, conflicts with the rule which, as we have seen, obtains in other and great systems of railroad, by which, for the purpose of avoiding equality and preference, foreign railway fuel cars, private cars, and company fuel cars are made one of the factors upon which a mine is rated in order to fix the basis upon which its distributive share of cars is to be allotted in case of car shortage. And from this

it must follow, if the proposition contended for be maintained, that it would not only relieve the railroad company, whose rights are here involved, from the obligation of taking into account its fuel cars in the making of the distribution, but from the duty even to consider them for the purpose of capacity rating. As a result it would lead to the overthrow of the system of rating prevailing on other railroads, by which, as we have said, such cars are taken into account—a consequence which is well illustrated by the case of *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497.

Under these conditions, it is clear that doubt, if it exist, must be resolved against the soundness of the contentions relied on. But that rule of construction need not be invoked, as, we think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this: that commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on,—a doctrine the unsoundness of which has been apparent ever since the decision in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one. * * * * * *

The insistence that the necessary effect of an

order compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys coal, and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition; that is, that if, when coal is bought from a mine by a railroad, the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assails the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the Commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

Interstate Commerce Com'n. v .Illinois Central R. Co., 215 U. S. 452, 54 Law Ed. 280, 288, 289, 291.

A similar ruling as to the matter being within the jurisdiction of the Commission was made by this Court in the case of *Baltimore & Ohio Railroad Company et al, v. United States, ex rel Pitcairn Coal Company*, 215 U. S. 481:

> To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act, is sought, and an order, by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to

be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions.

These cases, it is true, deal with the instrumentalities, the cars of carriers subject to the act, but the order of the Commission required the carriers to remove unjust discriminations and undue preferences. Those preferences arose out of the allotment of cars for both state and interstate traffic. The order of the Commission sustained by this court has removed all those undue preferences and unjust discriminations; today the carriers apply the same rules for the distribution of cars in Illinois for shipments to Chicago that they do for shipments to St. Paul and Kansas City. So in the present case the Commission has required the removal of unjust discriminations and undue preferences in the transportation rates, as between the shipper from Houston to Lufkin, a typical consuming point in Eastern Texas, and the shipper from Shreveport to Lufkin. Compliance with the order by the carriers will put upon an equality all shippers to eastern Texas points, whether they be citizens of Louisiana or citizens of Texas. The order of the Commission is not directed against the Texas state rates and does not of necessity "apply" to such rates. The action of the Texas State Commission, obedience to which by the appellants herein brought about the unjust discrimination condemned by the Commission, *directly* affects traffic between Shreveport and these Texas points of consumption. If the Commission of Texas had made rates as the State of Minnesota made its rates, solely with the idea of prescrib-

ing what was just and reasonable for the service performed, there would probably have been no cause for complaint by the Railroad Commission of Louisiana. In the Minnesota rate case the Interstate Commerce Commission had not passed judgment upon the interstate rates.

Any order other than that entered in this case by the Interstate Commerce Commission would have been an abdication by that Commission of its administrative authority under the Act to regulate commerce. A holding by this Court that the Commission had the authority to make the order complained of herein will bring about uniformity, will break down a wall built by a State to control or direct the current of interstate commerce and will give citizens of every state equal opportunity to engage in interstate commerce. The commerce clause of the Constitution was designed to secure complete freedom of trade and commerce; the Act to regulate commerce is but Congressional expression of the same purpose. Unjust discriminations and undue preferences have no proper place in commerce among the states. The order of the Commission is lawful; the Commerce Court did not err in dismissing appellants' petition; and the decree should be affirmed.

Respectfully submitted,

R. G. PLEASANT,
W. M. BARROW,
M. W. BORDERS,
JOHN S. BURCHMORE,
LUTHER M. WALTER,
Attorneys for Intervenor.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 567.

HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY ET AL., APPELLANTS,

v.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

No. 568.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS,

v.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
Solicitor.

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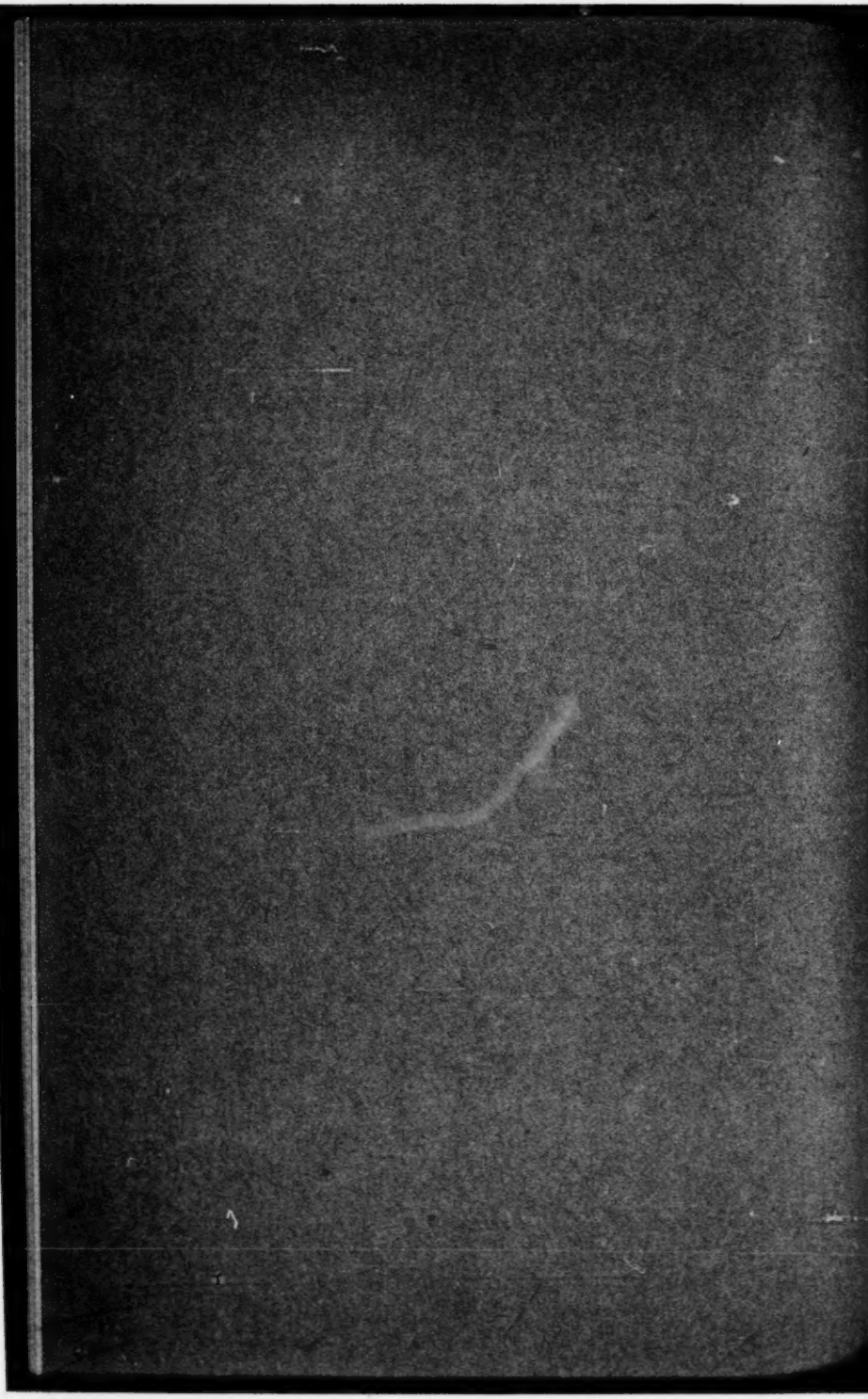

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY et al., appellants, *v.* UNITED STATES, INTERSTATE COMMERCE COMMISSION, et al., appellees.	No. 567.
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APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

These cases are appeals from final decrees of the Commerce Court dismissing petitions filed in that court by appellants against the United States to obtain decrees annulling and setting aside an order of the Interstate Commerce Commission, dated

March 11, 1912. The body of the order, with certain exceptions noted, reads as follows:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.
>
> *It is ordered*, That defendants The Texas & Pacific Railway Co., the Houston, East & West Texas Railway Co., and Houston & Shreveport Railroad Co. be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting their present class rates for the transportation of traffic from Shreveport, La., to the points in Texas hereinafter mentioned on their respective lines, as the commission in said report finds such rates to be unjust and unreasonable.
>
> *It is further ordered*, That defendant The Texas & Pacific Railway Co. be, and it is hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of traffic from Shreveport, La., to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are

found by the commission in its report to be reasonable, to wit: [Table of rates omitted.]

It is further ordered, That defendants The Houston, East & West Texas Railway Co. and Houston & Shreveport Railroad Co. be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of traffic from Shreveport, La., to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the commission in its report to be reasonable, to wit: [Table of rates omitted.]

It is further ordered, That defendant The Texas & Pacific Railway Co. be, and it is hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, La., to Dallas, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the commission in said report to be reasonable.

It is further ordered, That defendants The Houston, East & West Texas Railway Co. and Houston & Shreveport Railroad Co. be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May,

1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, La., to Houston, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Houston, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the commission in said report to be reasonable.

And it is further ordered, That said defendants be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, substantially similar practices respecting the concentration of interstate cotton at Shreveport, La., to those which are contemporaneously observed by said defendants respecting the concentration of cotton within the State of Texas, provided the practices adopted shall be justifiable under the act to regulate commerce and applicable fairly under like conditions elsewhere on the lines of such defendants. (Rec., No. 568, pp. ————————.)

SUMMARY OF CIRCUMSTANCES AND CONDITIONS WHICH PRECEDED THE MAKING OF THE ORDER.

On or about March 8, 1911, the Railroad Commission of Louisiana, by its members, J. J. Meredith, Shelby Taylor, and Henry B. Schreiber, filed in the office of the commission a complaint against the appellants and certain other carriers, wherein it

alleged, among other things, that class rates maintained, exacted, and collected by the appellants for the transportation of freight articles in a westerly direction to points on their lines of railway in the State of Texas from Shreveport, La., were unjust and unreasonable in and of themselves, and were also unjustly discriminatory in that they were much greater in each instance than the rates contemporaneously maintained, exacted, and collected by appellants for the transportation of like traffic over said lines in an easterly direction to said destination points from the cities of Dallas and Houston, in the State of Texas, and that, by reason of such discrimination, the latter two cities were given undue and unreasonable preference and advantage and Shreveport was subjected to undue and unreasonable prejudice and disadvantage. (Rec., No. 567, p. 2.)

After due hearing and investigation the commission made a report in the premises, wherein it stated its findings and conclusions as below:

> We find:
>
> (1) That the present class rates out of Shreveport to points in Texas on the Texas & Pacific Railway included in the following table and to points in Texas on the Houston, East & West Texas Railway are unjust and unreasonable.
>
> (2) That just and reasonable class rates on these lines of railroad should not exceed the following:

On the Texas & Pacific Railway.

From Shreveport, La., to—	Distance.	Class rates in cents per 100 pounds.									
		1	2	3	4	5	A	B	C	D	E
	Miles.										
Waskom, Tex	22.7	18	16	14	12	10	11	9	7	6	5
Jonesville, Tex	26.0	19	17	15	13	11	12	10	8	7	6
Scottsville, Tex	34.1	22	20	18	16	14	15	13	10	8	7
Marshall, Tex	42.0	24	22	20	18	16	17	14	11	9	7
Hallsville, Tex	55.2	29	27	25	23	19	20	17	14	12	9
Longview, Tex	65.7	32	29	27	25	20	21	18	15	13	10
Willow Springs, Tex	69.1	34	31	29	27	21	22	19	16	13	10
Camps, Tex	72.6	35	32	30	28	22	23	20	17	14	11
Gladewater, Tex	78.2	37	34	32	30	23	24	21	18	14	11
Big Sandy, Tex	88.3	40	37	35	32	24	25	22	19	15	12
Hawkins, Tex	94.0	42	39	36	33	25	26	23	20	16	13
Crow, Tex	100.5	44	41	38	35	26	27	24	21	16	13
Mineola, Tex	111.5	48	45	41	39	28	29	26	23	17	14
Grand Saline, Tex	124.6	52	48	44	42	30	31	28	25	18	15
Edgewood, Tex	135.1	54	50	45	43	31	32	29	26	19	16
Wills Point, Tex	142.3	56	52	47	45	32	33	30	26	19	16
Elmo, Tex	151.4	58	54	49	47	33	34	31	27	19	16
Terrell, Tex	157.9	60	56	51	49	34	35	32	28	20	16
Lawrence, Tex	161.9	61	56	51	49	35	36	33	28	20	16
Forney, Tex	169.4	63	58	52	50	36	37	34	29	20	16
Mesquite, Tex	177.6	65	60	54	52	37	38	35	29	21	16
Orphans Home, Tex	182.3	66	61	55	53	37	38	35	30	21	16

On the Houston, East & West Texas Railway.

From Shreveport, La., to—	Distance.	Class rates in cents per 100 pounds.									
		1	2	3	4	5	A	B	C	D	E
	Miles.										
Joaquin, Tex	42.8	25	23	21	19	17	18	15	12	10	8
Teneha, Tex	54.3	29	27	25	23	19	20	17	14	12	9
Timpson, Tex	63.9	32	29	27	25	20	21	18	15	13	10
Garrison, Tex	72.3	35	32	30	28	22	23	20	17	14	11
Appleby, Tex	83.3	38	35	33	30	23	24	21	18	14	11
Nacogdoches, Tex	92.4	41	38	35	32	25	26	23	20	16	13
Angelina, Tex	104.3	45	42	39	36	27	28	25	22	17	14
Lufkin, Tex	112.5	48	45	41	39	28	29	26	23	17	14
Renova, Tex	127.6	52	48	44	42	30	31	28	25	18	15
Corrigan, Tex	137.7	55	51	46	44	32	33	30	26	19	16
Moscow, Tex	143.2	56	52	47	45	32	33	30	26	19	16
Valda, Tex	147.0	57	53	48	46	33	34	31	27	19	16
Leggett, Tex	151.0	58	54	49	47	33	34	31	27	19	16
Livingston, Tex	159.2	60	56	51	49	34	35	32	28	20	16
Goodrich, Tex	167.3	62	57	51	49	35	36	33	28	20	16
Shepherd, Tex	175.4	64	59	53	51	36	37	34	29	21	16
Cleveland, Tex	187.5	67	62	56	54	38	39	36	30	21	16
Midline, Tex	194.2	69	64	58	56	39	40	37	31	22	17
New Caney, Tex	203.4	71	65	58	56	40	41	37	31	22	17
Pauli, Tex	208.8	72	66	59	57	40	41	38	32	22	17
Humble, Tex	213.6	73	67	59	57	41	42	38	32	22	17
Houston, Tex	230.7	77	70	60	58	43	44	39	33	23	17

(3) That such carriers maintain higher rates from Shreveport to points in Texas than are maintained from cities within Texas to such

points under substantially similar conditions and circumstances.

(4) That thereby an unlawful and undue preference and advantage is given to such Texas cities, and a discrimination that is undue and unlawful is effected against Shreveport.

(5) That an order should be issued directing said carriers to establish and maintain rates no higher than those above found to be reasonable out of Shreveport to the Texas points named under western classification.

(6) That the Texas & Pacific Railway Company shall cease and desist from charging higher rates upon any commodity from Shreveport into Texas than are contemporaneously charged for the carriage of such commodity from Dallas toward Shreveport for an equal distance.

(7) That the Houston & Shreveport Railroad Company and the Houston, East & West Texas Railway Company shall cease and desist from charging higher rates upon any commodity from Shreveport into Texas than are contemporaneously charged for the carriage of such commodity from Houston toward Shreveport for an equal distance.

It will be the duty of the carriers under such order to duly and justly equalize the terms and conditions upon which they will extend transportation to traffic of a similar character moving into Texas from Shreveport with that moving wholly within Texas. But in effecting such equalization the class scale of rates prescribed above shall not be exceeded.

> As to the matter of the concentration of Texas cotton at Shreveport specifically dealt with in the complaint we find the carriers pursuing a policy with respect to Texas cotton within Texas which they do not apply to Shreveport. This discrimination is likewise disapproved. Whatever is the practice pursued respecting the concentration of cotton within Texas the carrier shall be ordered to apply at Shreveport, provided the practice adopted shall be one justifiable under the act to regulate commerce and applicable fairly under like conditions elsewhere on the lines of the carriers. (Rec., No. 567, pp. 34–36.)

And thereupon the commission made and entered said order and caused it to be served upon the carriers named therein.

Thereafter the appellants, Houston, East & West Texas Railway Company, Houston & Shreveport Railroad Company, and Texas & Pacific Railway Company, filed petitions in the Commerce Court wherein they contended that the order was invalid as to all its requirements and asked that it be annulled and set aside. Later, the Missouri, Kansas & Texas Railway Company of Texas, the St. Louis Southwestern Railway Company, and the St. Louis Southwestern Railway Company of Texas intervened on behalf of the petitioners, and the Interstate Commerce Commission and the Railroad Commission of Louisiana intervened on behalf of the respondent.

When the case came on for final hearing the appellants abandoned their contentions, except in

so far as they relate to paragraphs 5 and 6 of the order, and, in other respects, they afterwards complied fully with the terms of the order. The paragraphs referred to require the carriers named therein to remove the discrimination resulting from the maintenance and exaction of rates for the transportation of traffic in a westerly direction over their lines of railway to destination points in Texas from Shreveport which are relatively greater than the rates contemporaneously maintained and exacted by them for the transportation of like traffic in an easterly direction over said lines to the same destination points from Dallas and Houston. The appellants say the commission may not require them to remove this discrimination because it does not result from action voluntarily taken by them, but is caused instead by unreasonably low and noncompensatory rates prescribed by the Railroad Commission of the State of Texas under authority conferred upon it by the legislature of that State, which the appellants were obliged to adopt and are now compelled to maintain in force. In this connection the commission, in its report, said:

> This proceeding places in issue the right of interstate carriers to discriminate in favor of State traffic and against interstate traffic. The gravamen of the complaint is that the carriers defendant make rates out of Dallas and other Texas points into eastern Texas which are much lower than those which they extend into Texas from Shreveport, La. A rate of 60 cents carries first-class traffic to the

eastward from Dallas, a distance of 160 miles, while the same rate of 60 cents will carry the same class of traffic but 55 miles into Texas from Shreveport. * * *

The Railroad Commission of Louisiana has brought this proceeding, under direction of the legislature of that State, for two purposes: (1) To secure an adjustment of rates that will be just and reasonable from Shreveport into Texas; and (2) to end, if possible, the alleged unjust discrimination practiced by these interstate railroads in favor of Texas State traffic and against similar traffic between Louisiana and Texas.

The railroads deny that the rates out of Shreveport are unreasonable, but place their defense mainly upon the proposition that they are compelled by the Railroad Commission of Texas to effect the discrimination here involved.

POLICY OF THE TEXAS COMMISSION.

The Railroad Commission of Texas, while not made a party to this proceeding, was notified of the hearing, but was not represented thereat. The position which it takes, however, appears from the following letter, which was incorporated in the record:

"AUSTIN, TEX., *September 12, 1911.*

"Mr. H. B. PITTS,

"*Secretary Progressive League,*

"*Marshall, Tex.*

"DEAR SIR: We beg to acknowledge the receipt of your letter of the 9th instant, with which you inclose letter from Mr. A. T. Kahn,

of Shreveport, to Mr. W. L. Martin, of your city, with reference to securing a reduction of rates on classes from Shreveport, and we note your request for a statement from the commission in order that you may properly understand the matter involved, and in reply you are advised:

"For the rates referred to from Shreveport to Texas points to be reduced would, in the opinion of this commission, be very much against the interests of the Texas jobber whom it has been the endeavor of this commission to protect, and by way of explanation we will state:

"Shreveport enjoys now, and has for years past, very low carload rates from northern and eastern points, much lower than the carload rates on the same commodities from the same points to Texas jobbing points. These carload rates in, plus their local rates out, to Texas points gave them, of course, an advantage over the Texas jobber, and to offset this the commission adopted an adjustment of rates which you will find on page 263 of our nineteenth annual report, copy of which is being mailed to you under another cover. For the local rates to be now reduced from Shreveport to Texas points would tend to counteract the effect of the commission's action and to place the Texas jobber at the same disadvantage under which he previously labored.

"Yours, respectfully,

"ALLISON MAYFIELD,
Chairman."

THE PROBLEM RAISED.

The petition of the complainants is that this commission "establish the same basis of rates of transportation between Shreveport and east Texas points as are accorded by defendants to Texas competitors of Shreveport interests in the same line of business for the same distances."

With this petition we can not comply unless such power has been granted us under the first, third, and fifteenth sections of the act to regulate commerce. We have no power to require an interstate carrier to put into effect from an interstate point a State-made schedule of rates; our power is limited to condemning unreasonable rates and fixing maximum rates that are in our judgment just and reasonable. Therefore we may not say that because a carrier has in effect State-made rates upon State traffic such rates shall be established by it upon interstate business, for, to put the matter bluntly, the rates fixed by a State commission are not prescribed as a standard by the act of Congress governing interstate rates of transportation. The Texas rates as such, therefore, we may not prescribe. If, however, they stand the test of reasonableness they may be adopted.

Passing, then, to the question of discrimination, has this commission the power to say that whatever rates an interstate carrier makes between points in Texas shall not be exceeded for the same distance under like conditions between Shreveport and Texas points? In

other words, may a carrier engaged in interstate commerce discriminate against a city beyond the border of a State by imposing upon the city's traffic rates which deny its shippers access upon equal terms to the communities of an adjoining State?

This is an appeal to the powers lodged in this commission under the third section of the act—that provision which is aimed at the destruction of undue preference and advantage. We thus meet directly the most delicate problem arising under our dual form of government. Congress asserts its exclusive dominion over interstate commerce; the State asserts its absolute control over State commerce. The State for its own purposes establishes rates designed to protect its own communities and promote the development of its own industries. These rates are adopted by the interstate carriers upon State traffic but are not adopted upon interstate traffic. Thus arises a discrimination in favor of communities within the State, and interstate commerce suffers a corresponding disadvantage. May this commission end such discrimination by saying to the interstate carrier: "You may not distinguish between State and interstate traffic transported under similar conditions. If the rates prescribed for you by State authority are not compensatory upon this specific traffic as to which discrimination is found the burden rests upon you, irrespective of your obligation to the State, to so adjust your rates that justice will be done between communities regardless of the invisible State line which divides

them." To which we are compelled to answer, that the effective exercise of its power regarding interstate commerce makes necessary the assertion of the supreme authority of the National Government, and that the Congress has appropriately exercised this power in the provisions of the act to regulate commerce, touching discrimination. (Rec., No. 567, pp. 21–22 and 27–28.)

The Texas commission prescribed a schedule of class rates, called "standard" rates, for the transportation of freight articles generally between points in the State of Texas which are the same, relatively, as the class rates afterwards established by the appellants for similar transportation from Shreveport to certain destination points in Texas, in partial compliance with the commission's said order of March 11, 1912; but after standard rates had been thus established the Texas commission, for the purpose, as above shown, of offsetting differences in interstate rates to Shreveport as compared with Dallas and Houston, from northern and eastern points, prescribed another schedule of rates, known as "commodity" rates, which are much less in each instance than said standard rates, for the transportation of like articles from the latter two cities to said destination points; and the action of the appellants in exacting the higher class rates from Shreveport, while contemporaneously applying the lower commodity rates from Dallas and Houston, is the discrimination which was found

by the commission to be undue. Upon this finding of undue discrimination the commission based paragraphs 5 and 6 of its said order of March 11; and the question of whether those portions of the order are valid is the only matter now before the court for determination.

The appellants say that, in effect, the portions of the order referred to are a regulation of intrastate rates of transportation, and they contend, first, that such regulation is beyond the power of the Congress, and, second, that even if the fact be otherwise, such power has not been conferred upon the Interstate Commerce Commission.

POINTS.

I.

THE POWER OF THE CONGRESS TO REGULATE INTERSTATE COMMERCE DOES NOT DEPEND UPON THE EFFECT SUCH REGULATION MAY HAVE UPON INTRASTATE COMMERCE.

Upon this point it does not seem necessary to make an extended argument. In *Gibbons* v. *Ogden* (9 Wheat., 1), this court, speaking through Mr. Chief Justice Marshall, concerning the power of the Congress to regulate commerce among the several States, said:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. (Id., 196.)

And from the doctrine thus established there has since been no departure. (*The Second Employers' Liability Cases*, 223 U. S., 1, 46–47; *The Minnesota Rate Cases*, 230 U. S., p. 352.)

It is true that this power is not unlimited. The Congress may not so legislate as to deprive a person of property without due process of law or take private property for public use without just compensation. But a law regulating interstate commerce, enacted by the Congress, can not be defeated by showing that it will necessarily interfere with a regulation of intrastate commerce, prescribed by a tribunal acting under authority conferred by the legislature of a State. In this connection the Commerce Court, in its opinion, said:

> The right of a State to control the movement of its internal commerce and the instrumentalities employed in such movement is not unlimited, as the Supreme Court has repeatedly declared. In the first case which involved the scope and meaning of the commerce clause, *Gibbons* v. *Ogden* (9 Wheat., 1), the line of demarkation between State and Federal power was defined by Chief Justice Marshall in the following language:
>
> "It is not intended to say that these words (commerce among the States) comprehend that commerce which is completely internal, which is carried on between man and man in a State or between different parts of the same State, and which does not extend to *or affect* other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive

as the word 'among' is, it may very properly be restricted to *that commerce which concerns more States than one.* * * * The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the Nation, *and to those internal concerns which affect the States generally,* but not to those which are completely within a particular State, *which do not affect other States,* and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government." (Italics ours.)

This definition has been uniformly accepted and the language itself quoted with approval in a number of cases. *The Daniel Ball* (10 Wall., 557, 565); *The Lottery Cases* (188 U. S., 321, 346); *The First Employers' Liability Cases* (207 U. S., 463, 493). And quite recently, in *The Second Employers' Liability Cases* (223 U. S., 1, 54), Mr. Justice Van Devanter, after quoting to the same effect from *McCulloch* v. *Maryland* (4 Wheat., 426), remarks that "particularly apposite is the repetition of that principle in *Smith* v. *Alabama*" (124 U. S., 465, 473), where it is stated as follows:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts

with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

In the light of these decisions and many others of similar import it seems clear to us that Congress is invested with ample power to prevent or remove such a discrimination as is here considered. (205 Fed., 382–383.)

II.

IN FINDING THE DISCRIMINATION TO BE UNDUE AND REQUIRING ITS REMOVAL THE COMMISSION DID NOT EXCEED THE POWERS CONFERRED UPON IT BY THE ACT TO REGULATE COMMERCE.

Pertinent portions of the act are as follows:

SECTION 1. That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * *, from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, * * *.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable

prejudice or disadvantage in any respect whatsoever.

SEC. 15. That whenever, after full hearing upon a complaint made as provided in section 13 of this act, * * *, the commission shall be of the opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of passengers or property * * *, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

It is admitted that the carriers named in the order are covered by the language of section 1; that as a matter of fact, the discrimination condemned by the commission exists, and can not be justified by anything inherent in the transportation services performed by the carriers, and that the full hearing provided for in section 15 was accorded by the commission; but it is insisted that, because of a proviso contained in section 1, the discrimination is not covered by the provisions of sections 3 and 15. The language of the proviso, so far as material here, is as follows:

> *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, * * *.

In other words, it is contended that the effect of the proviso is to modify the comprehensive language of the paragraph of section 3 above quoted and prevent it from applying to a discrimination against interstate commerce, regardless of its character or extent, if it is caused by rates applied to the transportation of intrastate commerce, and thereby render invalid any order made by the commission, under authority conferred upon it by section 15, requiring that such discrimination be removed.

It is apparent that if this contention were held to be sound it would result that a very large portion

of interstate commerce carried on by railroad would be left without governmental regulation of any kind, because of course it can not be successfully contended that interstate commerce may be regulated either by a tribunal acting under authority conferred by an individual State or by the State itself. However, such a construction of the law can not be upheld.

III.

SECTION 1 OF THE ACT COVERS ALL INTERSTATE AND FOREIGN COMMERCE CARRIED ON BY RAILROAD.

In *Texas & Pacific Railway Company* v. *Interstate Commerce Commission* (162 U. S., 197) this court, after quoting the language of section 1, said:

> It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State) as well that between the States and Territories as that going to or coming from foreign countries. (Id., 212.)

IV.

THE PROVISO IN SECTION 1 OF THE ACT DOES NOT CREATE AN EXCEPTION, BUT IS SIMPLY A DISCLAIMER AS TO TRANSPORTATION WHOLLY WITHIN A STATE, WHICH DOES NOT CONCERN OR AFFECT ANY OTHER STATE.

The Congress inserted the proviso in section 1 of the act for the sole purpose of manifesting in unmistakable terms an intention of confining the provisions of the act to interstate and foreign commerce and of

disclaiming an intention to exercise such control over intrastate commerce as might be held to be exclusively within the jurisdiction of the individual States. Upon this point the Commerce Court, in its opinion, said:

> The intent and meaning of this proviso has been quite fully discussed by this court in *Denver & R. G. R. Co.* v. *Interstate Com. Com'n* (195 Fed., 968) and a conclusion therein reached substantially adverse to the contention here considered. In that case we said:
>
> "Section 1 not only subjects to the act, first, certain carriers, but also, second, certain transportation. The proviso relates not to the carriers but to the transportation, and is therefore to be read in connection with the second clause of the section and not with the first.
>
> * * * * *
>
> "Then, out of abundant caution, as it seems, and by way of disclaimer of any authority over a carrier that confined its business to one State and was not engaged in such interstate business as would bring it within the first clause, the proviso was added.
>
> * * * * *
>
> "The proviso, therefore, must be regarded as a disclaimer and not as an exception. It could not, of course, be an exception to the second grant of jurisdiction over certain transportation, and it does not in any way refer to the first grant of jurisdiction over certain car-

riers, either by way of disclaimer or by way of exception.

* * * * *

"This construction gives consistent and appropriate meaning to those provisions of the first section which define the scope and application of the entire enactment. It sustains the act as a comprehensive scheme of regulation designed to include all interstate transportation wholly by railroad, or partly by railroad and partly by water, when both are used under a common arrangement, *and to exempt only that intrastate transportation which is not within the power of Congress to regulate.*"

Adhering to the views then expressed, which are summed up in the last paragraph quoted, we hold that this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the act to regulate commerce, to exceed its constitutional power, and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect of such matters as are here in dispute. If this construction be correct, it follows that the proviso in no way prevents the application of the third section to the facts of this case, and therefore it was within the authority of the commission to make the order in question (205 Fed., 384.)

To the same effect see, *Int. Com. Com.* v. *Goodrich Transit Co.* (224 U. S., 194, 207).

And statements made by the commission were as follows:

> The language [language of the proviso] was intended as a recognition of the fact that Congress by this act was not assuming to regulate transportation entirely within the borders of a State. It does not by the broadest construction justify the inference that an interstate carrier may pursue a policy of rate making within a State that would affect unlawfully commerce among the States. The phrase "among the several States," as recently defined by Mr. Justice Van Devanter with nice precision, "marks the distinction for the purpose of governmental regulation between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally." (*Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S., 1, decided Jan. 1, 1912.) It is not merely the commerce which is confined to a single State which is State commerce, but that which "does not affect other States." The State goes untouched as to its railroad policies so long as they do not trench upon the interstate field. Congress does not say that State rates shall be reasonable or that rebates upon State traffic shall be unlawful or that discrimination between localities within the State shall not be allowed. To reach these matters, so far as they do not affect interstate commerce, is the prerogative of the State, which is recognized

and protected by the language of the act quoted.

But, as to the nation, Congress has prohibited carriers of interstate commerce from giving undue preference or advantage to one community over another. To say that this prohibition permits such carriers to exclude a city within the State of Louisiana from doing business upon equal terms with the cities in Texas is to distort the plain meaning of the act and make the regulation of interstate commerce farcically ineffective. To say that interstate carriers may so discriminate because of the orders of a State commission is to admit that a State may limit and prescribe the flow of commerce between the States.

And if one State may exercise its power of fixing rates so as to prefer its own communities, all States may do so. There would thus arise a commercial condition more absurd and unbearable than that which obtained prior to the Constitution when each State sought to devise methods by which its commerce could be localized. How utterly incongruous the result if the interstate carriers of Ohio should be allowed to make rates within that State which would so confine the commerce of its communities as to exclude on equal terms that of Buffalo or of Pittsburgh; and what national system of regulation could there be if interstate commerce could be discriminated against after such fashion? Manifestly Congress has dealt with the railroads of the country as servants of a national commerce and has accordingly laid down the rule of fair play to which they must conform.

> Congress passed this act with full knowledge and profound appreciation of those decisions of the Supreme Court in which it had been held that State commerce was that wholly within a State "and not affecting interstate commerce," as is fully shown by the Cullom report of 1886, out of which grew the act to regulate commerce. (Rec., No. 567, pp. 31, 32.)

V.

THE DISCRIMINATION WAS CAUSED BY ACTION OF THE CARRIERS WHICH WAS VOLUNTARY, WITHIN THE LEGAL MEANING OF THAT TERM.

The appellants say they can not be held responsible for the discrimination, because it resulted from the application of intrastate rates prescribed by a State authority, which they were obliged to adopt and are now compelled to maintain in force. In this connection the commission said:

> An interstate carrier must respect the Federal law, and if it is also subjected to State law it must respect that in so far as it can without doing violence to its obligations under the national authority. Before us are carriers which undeniably discriminate directly against interstate traffic. To this charge they plead that all they have done was to obey the orders of a State commission, as against which they were helpless. They appealed to no court for relief, nor to this commission. * * * While the Texas commission has evidenced a policy of home protection for its own State's cities,

there is every evidence that the carriers moving into and within Texas accepted this policy as their own, claiming that not to have adopted it would have led to reprisal on the part of the State authorities. The interstate carrier which adopts a policy, even under State direction, that makes against the interstate movement of commerce must do so with its eyes open and fully conscious of its responsibilities to the Federal law which guards commerce "among the States" against discrimination.

It is suggested that the exercise of such power to end discrimination between rates within a State and rates to interstate points must surely lead to a conflict in which the jurisdiction of one sovereignty or the other must give way. To this suggestion the one and sufficient answer is that when conditions arise which in the fulfillment of its obligation and the due exercise of its granted power to regulate commerce among the States, make such course necessary the National Government must assume its constitutional right to lead. (Rec., No. 567, pp. 33–34.)

At the time they were required to and did apply the lower commodity rates to the transportation of traffic from Dallas and Houston to the common destination points in Texas here involved the appellants knew that they were applying the higher class rates to the transportation of like traffic to the same destination points from Shreveport; that there was nothing inherent in the transportation services performed

by them which would justify a charge for transportation over a certain distance into Texas from Shreveport which was greater than the charge contemporaneously applied for transportation over a like distance within Texas from Dallas or Houston; that by section 3 of the act to regulate commerce they were prohibited from giving undue preference and advantage to Dallas and Houston and subjecting Shreveport to undue prejudice and disadvantage, and that where a conflict arises between Federal and State authority the latter must give way because the former is supreme. But notwithstanding these matters, they applied the commodity rates, and thus created the discrimination, without making any attempt, other than a useless protest, to have the order of the Texas commission set aside.

Under such circumstances we think it can not be successfully contended that the action of the appellants in creating the discrimination was involuntary. On the contrary, we submit that such action was entirely voluntary, within the legal meaning of that term.

In this connection the appellants appear to rely particularly upon the decision of this court in the case of *East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Commerce Commission* (181 U. S., 1), where the court, speaking through the present Chief Justice, said:

> The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or

> undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. (Id., 18.)

In that case the complaint before the commission was that certain carriers were violating the provisions of the long-and-short-haul clause of the fourth section of the act to regulate commerce by exacting rates for the transportation of traffic over their lines of railway from the Atlantic seaboard to Chattanooga, the shorter distance point, which were greater, in each instance, than the rates contemporaneously applied by them to the transportation of like traffic from the seaboard through Chattanooga to Nashville, the longer distance point. The commission found that in making the lower rates to Nashville the defendant carriers were simply meeting the competition of other carriers subject to the act, over which they had no control, and that if they should abandon the Nashville traffic no change would thereby result in the relation of rates as between Nashville on the one hand and Chattanooga on the other. (Id., 19.) It held, however, that the discrimination could not lawfully be made, except after application to, and with the consent of, the commission. (Id., 7–8.) And this court held such a construction of the act to be erroneous.

It goes without saying that if the appellants should cease and desist from the discrimination here involved

a material change would be thereby made in the relation of rates as between Shreveport on the one hand and Dallas and Houston on the other. And to say that the appellants have no control over the discrimination would be equivalent to saying that a discrimination against interstate commerce prohibited by Federal authority can not be removed because its continuance is required by a State authority. It is therefore apparent that the decision of this court in the *East Tennessee, Virginia & Georgia Case* has no application to the pertinent facts in this case.

But there are other reasons why such application can not be made. In the *East Tennessee, Virginia & Georgia Case* this court did not determine whether the discrimination involved was undue, but, after correcting the error of law made by the commission, as aforesaid, made the following provision for further proceedings:

> *The decree of the Circuit Court of Appeals should be reversed, with costs*, and the case be remanded to the Circuit Court, with instructions to set aside its decree adjudging that the order of the commission be enforced and to dismiss the application made for that purpose, with costs, the whole to be without prejudice to the right of the commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law.
>
> And it is so ordered. (Id., 29.)

Also, as stated in its opinion by the Commerce Court:

> Moreover, the administrative authority of the commission has been materially increased by the amendments of 1906 and 1910, as the Supreme Court observed in the recent *Procter & Gamble Case* (225 U. S., 282, 297), and it may be open to doubt whether decisions under the former fourth section would be followed in cases arising under the amended statute. (205 Fed., 385.)

VI.

THE CONGRESS MAY REGULATE INTERSTATE COMMERCE, EVEN THOUGH SUCH REGULATION MAY MATERIALLY AFFECT INTRASTATE COMMERCE, BUT THE POWER OF A STATE OVER INTRASTATE COMMERCE IS LESS COMPREHENSIVE.

We have seen that the power of the Congress to regulate interstate commerce does not depend upon the effect such regulation may have upon intrastate commerce, but we have also seen that the power of a State to regulate intrastate commerce is confined to cases where such regulation will not materially discriminate against or otherwise embarrass interstate commerce. In this connection see, *supra*, *Gibbons* v. *Ogden* (9 Wheat., 1, 194–196), *The Second Employers' Liability Cases* (223 U. S., 1, 46–47, 54), *The Lottery Cases* (188 U. S., 321, 346), and *Smith* v. *Alabama* (124 U. S., 465, 473). And see, also, to the same effect, *The Gloucester Ferry Case* (114 U. S. 196, 203–204); *The Pullman Company Case* (216 U.S., 56, 65); *Oklahoma* v. *Kansas Natural Gas Company* (221 U. S., 229, 261); *Southern Railway Company* v.

United States (222 U. S., 20, 26–27); *Brown* v. *Houston* (114 U. S., 622, 633); *The Eubank Case* (184 U. S., 27, 36); *The Illinois Central Case* (215 U. S., 452, 474); *Penn. R. Co.*, v. *Int. Com. Com'n*, 193 Fed., 81, 84); *Shepard* v. *Northern Pac. Ry. Co.* (184 Fed., 765, 795).

In the Shepard case the court, speaking through Sanborn, circuit judge, said:

> By the same mark, because it is a regulation of interstate commerce, the Nation may regulate and prohibit discriminations wrought by an undue difference between interstate and intrastate rates, although such regulation or prohibition may also to some extent affect and regulate intrastate commerce. For to the extent necessary completely and effectually to regulate interstate commerce the Nation by the Congress and its courts may affect and regulate intrastate commerce. (Id., 795.)

VII.

THE VIEW THAT A DISCRIMINATION AGAINST INTERSTATE COMMERCE MAY NOT BE REMOVED BY FEDERAL AUTHORITY BECAUSE IT RESULTS FROM INTRASTATE RATES PRESCRIBED BY A STATE AUTHORITY AND APPLIED TO THE TRANSPORTATION OF INTRASTATE TRAFFIC IS BASED UPON AN ERRONEOUS THEORY.

In *The Second Employers' Liability Cases, supra*, it was contended that the employers' liability act was unconstitutional because it made an interstate carrier liable for an injury inflicted upon an employee engaged in interstate commerce by an employee engaged in intrastate commerce. And in reply to this

contention the court, speaking through Mr. Justice Van Devanter, said:

> But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. * * * That power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act * * * deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein. (Id., 51–52.)

VIII.

THE ORDER OF THE TEXAS COMMISSION IS AT LEAST VOIDABLE, SINCE IT WAS NOT MADE FOR THE PURPOSE OF PRESCRIBING REASONABLE RATES FOR THE TRANSPORTATION OF INTRASTATE COMMERCE, BUT WAS MADE INSTEAD FOR THE PURPOSE OF DISCRIMINATING AGAINST INTERSTATE COMMERCE IN FAVOR OF INTRASTATE COMMERCE.

The cases above referred to fully establish that an order of a State commission which discriminates against interstate commerce, although made under

State authority and for the purpose of regulating intrastate commerce, will be held to be void to the extent of such discrimination. In this case, however, we have seen that the order of the Texas commission was not made for the purpose of prescribing reasonable rates for the transportation of intrastate traffic from Dallas and Houston to the common destination points in Texas, but was made instead for the sole purpose of discriminating against and embarrassing interstate traffic contemporaneously transported to said destination points from Shreveport. And under these circumstances it would be strange, indeed, if the order of the Federal commission, acting under authority conferred by the Congress, requiring that the discrimination be removed, could not be enforced because its enforcement would interfere with the order of the Texas commission. In this connection the Commerce Court, in its opinion, said:

> In the report upon which that order [order of the commission] is based the commission has found, upon convincing proofs therein recited, that the local rates here involved were imposed by the Texas commission for the purpose of favoring the industries and communities of that State. Indeed, the evidence is said "to demonstrate that Texas has a policy of her own with respect to the protection of home industry, which has been made effective by consistent and vigorous action on the part of her commission." And in this policy, as is further found, the petitioner and other carriers in like situation have apparently ac-

quiesced. This plainly means, nor is it seriously disputed, that these Texas rates were prescribed not with reference to their intrinsic reasonableness, or on the basis of just compensation for the services rendered, but with the undisguised intention of giving preference and advantage to the dealers of the State as against their competitors in Louisiana and other States. As Commissioner Lane puts it, "the Texas commission is acting *in loco parentis* to the jobbing interests of Texas." It also means, as the record indicates, that the rates so established have been accepted by petitioner without more, at most, than a perfunctory protest.

In view of these uncontradicted facts we are constrained to reject the plea of compulsion, not merely or mainly because petitioner has assented to the protective policy of the Texas commission, but because that policy directly affects other States and the flow of commerce from those States, and thereby encroaches upon the field in which Federal authority is exclusive and supreme. To hold otherwise in this case is virtually to admit that the purpose of the Federal act may be thwarted and its operation made ineffective by the laws and administrative effort of the State of Texas. It is evident, as already stated, that these Texas rates were designed and have the necessary result of securing unjust and arbitrary advantage to the shippers for whom they were provided by restricting the movement of commodities from other States and measurably excluding outside dealers from

competing for trade in Texas territory. The effect of this action by the Texas commission is not merely incidental and unimportant, but direct, substantial, and to an extent prohibitive. In our judgment it is a positive interference with interstate commerce, which Congress alone has power to regulate, and constitutes a violation of the law which Congress, in the exercise of its power, has duly enacted. The pervading purpose of that law was to prevent carriers subject to its provisions from indulging in unfair and burdensome discriminations against persons and localities engaged in interstate commerce. But if such a patent discrimination as this case discloses can not be reached because it is brought about by a State commission, the law fails in a most important respect to accomplish its wholesome purpose. Moreover, if one State commission may create and perpetuate such a discrimination, other State commissions may take similar action for similar reasons, with results which would greatly impair and, indeed, largely defeat the effectiveness of Federal regulation. To say that conditions thus arising do not offend the Federal law and can not be corrected by the commission appointed to administer that law is to say in effect that State authority is superior to Federal authority when they come in conflict, whereas the reverse proposition has been repeatedly and invariably affirmed by the Supreme Court of the United States. (205 Fed., 386–387.)

If the Texas commission believed that interstate rates from northern and eastern points of origin to Shreveport as compared with interstate rates from the same points of origin to Dallas and Houston were unduly discriminatory or otherwise in violation of the act to regulate commerce it should have applied to the Federal commission for relief; but, as above shown (Rec., No. 567, p. 22), while it said that such interstate rates gave Shreveport an advantage over Texas jobbing points, it did not say the advantage was undue. Nevertheless, for the purpose of offsetting such advantage, it prescribed the aforesaid commodity rates from Dallas and Houston to said common destination points in Texas, and its action in doing so, we submit, is, to say the least, voidable.

IX.

A COMMISSION, ACTING UNDER AUTHORITY CONFERRED BY THE LEGISLATURE OF A STATE, MAY NOT OPERATE UPON INTRASTATE COMMERCE IN SUCH A MANNER AS, IN EFFECT, WILL AMOUNT TO THE LEVYING OF A DISCRIMINATORY TAX OR IMPOST UPON INTERSTATE COMMERCE, AND THUS PREVENT ITS FREE MOVEMENT FROM ONE STATE TO ANOTHER.

Upon this point, the present chairman of the commission, in his concurring opinion, said:

> Under the Constitution a State may not levy any tax or impost upon commerce from another State. A transportation rate that has been prescribed by, or that is subject to regulation by, a body created by law for that purpose is in essence a tax or impost upon

traffic. Here we have one State demanding that the tax upon its traffic shall not be assessed in such manner as to unjustly discriminate against its citizens by or as a result of action of another State, and an adjoining State insisting upon levying the taxes upon commerce in such manner and measure as to give a monopoly of the traffic here considered to the dealers and commercial centers of that State. It may be suggested that this action is not interference with, and does not impede the free flow of, commerce between the States; that it is simply inviting it to move through one channel or gateway instead of another. These rates, however, do not apply to through movement of the traffic from the points at which it is produced or manufactured to final points of consumption, but apply to the redistribution of such traffic after it has been laid down at distributing centers. A State may not obstruct a navigable waterway without the consent of the Federal Government, and it is no answer to say that it has opened another stream or channel in lieu of the one so obstructed. (Rec., No. 567, pp. 39–40.)

X.

THE COMMISSION COULD NOT HAVE REMOVED THE DISCRIMINATION BY PRESCRIBING REASONABLE RATES FOR THE TRANSPORTATION FROM SHREVEPORT TO SAID COMMON DESTINATION POINTS IN TEXAS.

It is admitted that, without reference to its effect upon intrastate traffic, the commission may, under authority conferred upon it by section 1 of the act

to regulate commerce, make an order prescribing reasonable rates for the transportation of interstate traffic, and it has been suggested that, acting under such authority, the commission might have removed said discrimination, and thus have avoided the conflict between Federal and State authority here involved.

The commission did prescribe reasonable rates for the transportation from Shreveport to said common destination points in Texas, but it will be seen that those rates were, in each instance, much greater than the intrastate rates which had previously been prescribed by the Texas commission for like transportation to said destination points from Dallas and Houston. It is therefore apparent that the suggestion referred to is without merit.

However, we observe no difference in principle between prescribing reasonable rates for the transportation of interstate commerce, on the one hand, and requiring that an undue discrimination against such commerce be removed, on the other hand; and if, without reference to the effect of its action upon intrastate commerce, the commission may prescribe such reasonable rates, we think it necessarilly follows that the commission may also, without reference to the effect of its action upon intrastate commerce, require that the discrimination referred to be removed.

XI.

FORMER DECISIONS OF THE COMMISSION IN CONFLICT WITH THE RULING HERE UNDER CONSIDERATION WERE PROMPTED BY A DESIRE ON THE PART OF THE COMMISSION TO AVOID CONFLICTS BETWEEN FEDERAL AND STATE AUTHORITY.

It has been pointed out that in former cases covering matters similar to those involved here the commission recognized the force of arguments which were the same in substance as the contentions of the appellants in this case, by confining itself to the authority conferred upon it by section 1 of the act and refraining from exercising the authority conferred upon it by section 3 of the act, but, as explained by Commissioner Prouty in his concurring opinion (Rec., No. 567, pp. 36–39), this acquiescence was prompted by a desire on the part of the commission to avoid conflicts between Federal authority on the one hand and State authority on the other.

However, we are unable to see wherein the circumstance referred to is material. Showing that the commission refrained from exercising authority possessed by it in one case would not even tend to show that it could not lawfully exercise that authority to its fullest extent in another case. It is both the right and the duty of the commission, whenever in its judgment facts and circumstances within its jurisdiction so require, to exert all the power it possesses under the act to regulate commerce. The question of whether it possessed the power it used in this

case is important, but whether it has used similar power in the past is a matter of no consequence whatever.

XII.

THE DECISION OF THIS COURT IN THE MINNESOTA RATE CASES IS IN ENTIRE CONSONANCE WITH OUR CONTENTIONS IN THIS CASE.

In the *Minnesota Rate Cases* (230 U. S., 352) this court held that rates for the transportation of intrastate traffic, prescribed by the Legislature of Minnesota, and, by the Railroad and Warehouse Commission of that State under authority conferred by said legislature, had not been shown to be unlawful, and were therefore binding upon interstate carriers, notwithstanding that they interfered with rates for the transportation of interstate traffic fixed by the carriers themselves. In this connection the court said that showing such interference was not equivalent to showing either that the rates so prescribed were an undue burden upon interstate commerce, or that they constituted a violation of the prohibitions against undue preference and undue prejudice contained in section 3 of the act to regulate commerce. However, the court reaffirmed principles previously announced by it to the effect: That the power of the Congress to regulate commerce among the several States is plenary, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution; that the individual States may not regulate or unduly discriminate against

such commerce; and that the words "among the several States," contained in the Constitution, distinguish between the commerce which concerns more States than one and the commerce which is confined within one State and does not affect other States. (Id., 398–399.)

Also, after stating that the effect of the proviso included in section 1 of said act is to leave the individual States free to prescribe reasonable rates for the transportation of intrastate traffic, subject to the limitations above mentioned, the court carefully distinguished the case in hand from a case like the one now under consideration, where the fact of undue discrimination has been determined by the Interstate Commerce Commission, the only tribunal having authority to determine such a fact under the provisions of the act to regulate commerce, as will appear from the following excerpt:

> It is urged, however, that the words of the proviso are susceptible of a construction which would permit the provisions of section 3 of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforce-

> ment of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier in such a case was giving an undue or unreasonable preference or advantage to one locality as against another or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it. * * * In the present case there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act, and no action of that body is before us for review. (Id., 419–420.)

It will thus be seen that the decision of this court in the *Minnesota Rate Cases* is not in opposition to, but is wholly in harmony with, our contentions in this case.

XIII.

WHEN THE ORDER OF THE COMMISSION WAS SERVED UPON THE APPELLANTS NAMED THEREIN IT BECAME NECESSARY FOR THEM TO ACT IN THE PREMISES, BUT THE NATURE OF THE ACTION TO BE TAKEN WAS A MATTER ADDRESSED SOLELY TO THEIR DISCRETION.

We do not claim that the order of the commission is conclusive, in the sense that it may not be reviewed in court for the purpose of ascertaining whether, in making it, the commission exceeded the powers conferred upon it by the law under which it operates, but we do claim that it was binding upon the appellants named therein unless and until suspended or set aside by a court of competent jurisdiction.

It will be observed that the order, to the extent that its validity is called in question here, might have been complied with by reducing the interstate rates from Shreveport, or by increasing the intrastate rates from Dallas and Houston, or by such reduction in the one case and increase in the other as to bring about the equality required. However, it may fairly be inferred that the commission, having found to be reasonable *per se* the interstate rates from Shreveport which were established in partial compliance with the commission's order, as aforesaid, would regard rates made by reducing said interstate rates as lower than the appellants might justly exact if the discrimination here involved did not exist.

It thus appears that when the order of the commission was served upon them, the appellants were

not thereby compelled to apply to the court for relief, but it is equally evident that they were free to do so, and that they might have requested the court, in proper proceedings instituted for the purpose, to annul and set aside, either the order of the commission or the order of the Texas commission, or both. As above stated, however, the question of procedure on their part was a matter for them alone to decide.

CONCLUSION.

We have shown that the standard rates were prescribed by the Texas commission for the purpose of establishing reasonable rates for the transportation of traffic between points in the State of Texas; that the commodity rates were prescribed by the Texas commission for the sole purpose of offsetting differences in interstate rates; that, upon application, the commission prescribed rates which it found to be reasonable *per se* for the transportation of interstate traffic from Shreveport; that the latter rates are the same, relatively, as said standard rates, and have been put in force by the appellants named in the commission's order; that the reasonable rates so prescribed by the commission are much greater in each instance than said commodity rates; that the commission, upon substantial evidence, and after according a full hearing in the premises, found the differences in rates last above mentioned to be an undue discrimination against said interstate traffic, and that, by an order regular in form, the commission required

the appellants referred to to remove said discrimination.

We have also shown that the power of the Congress to regulate commerce among the several States is plenary, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution; that by sections 3 and 15 of the act to regulate commerce the Congress has authorized the commission to determine whether a discrimination against interstate commerce is undue, and, if found to be so, to require its removal; that in requiring the removal of said discrimination the commission did not exceed the authority so conferred upon it, unless a proviso contained in section 1 of the act has the effect of depriving the commission of authority over such a discrimination, and that, reasoning by analogy from former decisions of this court, the proviso does not have that effect, because the words "wholly within one State," contained in the proviso, limit its operation to intrastate traffic which concerns only one State and does not affect any other State.

To construe the provisions of the act in accordance with the contentions of the appellants would inevitably have the effect, we submit, of clothing the individual States with control over a very large portion of the interstate commerce of the country, and of rendering impossible proper regulation of the remaining portion of that commerce. Such construction would also, we think, unnecessarily deprive the commission of power to remove and prevent harmful and injurious

discriminations against interstate commerce, while, as this court has repeatedly said, such removal and prevention was the primary purpose that Members of the Congress had in view when they framed and passed the aforesaid act.

Upon the record in this case, and for the reasons above set forth, we insist that the decrees of the Commerce Court dismissing the petitions of the appellants are correct and should be affirmed.

Respectfully submitted.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission,
Appellee.

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